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Supreme Court, U.S.  
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No. 83-

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

HERMAN G. MARTIN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA,

FOURTH APPELLATE DISTRICT

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## QUESTIONS PRESENTED

1. Where defendant chooses not to take the stand in his own behalf and the prosecutor, mentioning defendant by name, makes a direct reference to such failure to testify, does the concept of Griffin error require the reversal of the defendant's conviction?

2. Is a trial court authorized to grant a potential defense witness "use" immunity if such witness chooses to exercise his privilege against self-incrimination, where the proposed testimony is necessary to preserve the defendant's right to due process of law and compulsory process of witnesses under the Fifth and Sixth Amendments; and where other key witnesses have been





arrested and released without charges being filed in an obvious attempt by the prosecution to intimidate potential defense witnesses?

3. Did repeated attempts by the prosecutor to improperly associate the defendant with the "Mafia" in the minds of the jurors by soliciting reference to the defendant's prior undercover status with the Department of Justice and by analogizing the defendant to the "Godfather" during summation, deprive the defendant of a fair trial and due process of law, in light of the Griffin error that also occurred during the prosecutor's summation, where the prosecutor knew of the defendant's prior service to the United States Government and the comments, in the words of the Court of Appeal, "were unnecessary and



may have been offered in bad faith"?



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STATE OF CALIFORNIA, FOURTH APPELLATE  
DISTRICT





### OPINION BELOW

The opinion of the Court of Appeal, Fourth Appellate District, a two to one published 1983 decision numbered 4 Crim. 13945/15681 and appearing in the Official Reports as People v. Martin/In Re Martin on Habeas Corpus{1983} 150 CA 3d 148, appears as Appendix "A" to this Petition.

### JURISDICTION

Petitioner, Herman G. Martin, respectfully prays that a Writ of Certiorari issue to review the two to one published Opinion of the Court of Appeal, Fourth Appellate District, which was entered in this proceeding on

## THEORY

The theory of the present work is based on the assumption that the system of equations (1) can be solved for the unknown functions  $u$  and  $v$  in terms of the known functions  $f$  and  $g$ . This is done by the method of characteristics. The method of characteristics is a powerful tool for solving systems of partial differential equations. It involves finding curves in the  $(x, y)$  plane, called characteristics, along which the partial differential equations reduce to ordinary differential equations. These ordinary differential equations can then be solved to find the unknown functions  $u$  and  $v$ .

## CONCLUSION

The results of the present work show that the system of equations (1) can be solved for the unknown functions  $u$  and  $v$  in terms of the known functions  $f$  and  $g$ . This is done by the method of characteristics. The method of characteristics is a powerful tool for solving systems of partial differential equations. It involves finding curves in the  $(x, y)$  plane, called characteristics, along which the partial differential equations reduce to ordinary differential equations. These ordinary differential equations can then be solved to find the unknown functions  $u$  and  $v$ .

December 23, 1983. The Court of Appeal denied petitioner's Petition for Rehearing on January 13, 1984 (Appendix "B"). The decision became final as to that Court on April 19, 1984 (Rules 24{a} and 28, California Rules of Court). The California Supreme Court denied petitioner's Petition for Hearing on April 19, 1984 with two justices voting to grant a hearing (Appendix "C"). The remittitur issued on April 23, 1983 (Appendix "D").

This Court's jurisdiction is invoked under 28 United States Code Section 1257(3).



CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

Amendment V:

"No person... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law..."

United States Constitution,

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right... to have compulsory process for obtaining witnesses in his favor..."

United States Constitution,

Amendment XIV:

"...nor shall any state



deprive any person of life,  
liberty, or property without  
due process of law..."





## STATEMENT OF THE CASE

### A. Proceedings in the State Court

Petitioner was convicted by a jury in the Superior Court of the State of California, in and for the County of San Diego, of the offenses of murder in the second degree {California Penal Code Section 187}, conspiracy to commit extortion {California Penal Code Sections 518 and 182.1}, conspiracy to commit assault with a deadly weapon {California Penal Code Sections 245{a} and 182.1} and simple assault, a misdemeanor {California Penal Code Section 240}. As to the three felony counts, a principal was found to have been armed with a firearm {California Penal Code Section 12022{a}}. {CT 308-309}.



Upon conviction, petitioner moved the Court for a new trial and for modification of the verdict. These motions were denied. As to the murder count, petitioner was sentenced to a term of 15 years to life in state prison. The Court also imposed a one-year enhancement for the firearm allegation, to run consecutive to the 15 to life term {CT 266, 312}.

As to each of the two counts of conspiracy, petitioner was sentenced to three years in state prison and received a one-year enhancement for the firearm allegation. These terms were ordered stayed by the trial court. As to the misdemeanor count, petitioner was sentenced to six months in the County Jail, such sentence to run concurrent to the term imposed as to the murder count {CT 312}.

The first thing I noticed when I  
stepped out of the car was the  
familiarity of the streets. It was  
as if I had never left. The  
buildings were the same, the  
people were the same, and the  
feeling was the same. It was  
like a warm blanket. I had  
been away for so long, but  
here I was, back home. The  
streets were still the same, but  
there was a new energy. The  
people were still the same, but  
there was a new spirit. It was  
like a new chapter in an old  
book. I had been away for so  
long, but here I was, back home.  
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but there was a new energy. The  
people were still the same, but  
there was a new spirit. It was  
like a new chapter in an old  
book. I had been away for so  
long, but here I was, back home.

The Court of Appeal of the State of California, Fourth Appellate District, in a two-to-one published decision filed December 23, 1983 {People v. Martin/In Re Martin on Habeas Corpus}{1983} 150 CA 3d 148}, affirmed the judgment of conviction on all counts. {Appendix "A"}.

Petitioner's Petition for Rehearing was denied on January 13, 1984 {Appendix "B"}. Although two justices voted in favor of granting a hearing, the California Supreme Court denied hearing on April 19, 1984 {Appendix "C"}.

#### B. Statement of Facts

The record reveals that the victim in this case, Richard Crake, a San Diego area attorney, was murdered by one Andrew James Powell, on or about



May 12, 1981 {RT 1003-1005}.

Petitioner was tried and convicted on a theory of vicarious liability, i.e., conspiracy, there being no indication at trial that petitioner's alleged acts were done with any subjective intent to kill on his part. Accordingly, the People's case below was predicated almost entirely on the testimony of alleged conspirator Powell, which witness the Court of Appeal deemed to be "pivotal" {Appendix "A", p. 51}.

Powell, who had previously pled guilty to the murder of Crake, testified at trial that beginning March 23, 1981, he worked for petitioner at Anear Insurance Company performing general office duties {RT 945-946}.

Petitioner a former captain in the

# ARTICLE

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United States Army, had founded Anear Insurance Company in 1975 after having voluntarily and successfully worked for the Department of Justice to obtain convictions of members of organized crime. Petitioner, who at the time of trial was 62 years old and in poor health, was given a new identity by the United States government, following the completion of these operations. The United States Government thereafter moved petitioner, his wife and family to the San Diego area out of fear for the safety of petitioner and his family {CT 231-232}; {RT 1845-1846}.

At trial, San Diego attorney Donald F. McClean, Jr. testified as to litigation between petitioner and one George Frieh. During the pendency of this litigation appellant was deposed by Richard Crake. During the

THE HISTORY OF THE  
CITY OF BOSTON  
FROM THE FIRST SETTLEMENT  
TO THE PRESENT TIME  
BY  
JOHN B. BOWEN  
OF THE CITY OF BOSTON  
IN TWO VOLUMES  
VOL. I.  
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J. B. BOWEN, 1845.

deposition, petitioner, on the advice of counsel, refused to answer certain questions concerning his {petitioner's} background due to the nature of his previous activities with the Department of Justice and out of fear for his family's safety. {RT 1804, 1845-1846}.

Over petitioner's objection, evidence was admitted at trial that petitioner had stated to Robert Noel, a United States Attorney, that if ordered to answer certain questions about his work with the Department of Justice, he {petitioner} would commit perjury rather than reveal details about his background that might endanger himself and his family. {RT 1789-1790}.

Andrew Powell's testimony, in substance, was to the effect that petitioner sent Powell to see Crake and tell Crake that Petitioner wanted the



money owed him {\$100,000}. According to Powell, Powell and one Kathleen Piascik {aka "Cass"} thereafter visited Crake, although Powell testified at trial that he did not know why he visited Crake {RT 1154}. Powell stated that in the course of this visit Crake "went into a rage". A struggle ensued between Crake and Powell. Powell testified that Crake fell and pulled Powell on top of him. In the course of the struggle, Powell struck Crake with a gun allegedly provided by petitioner. {RT 1003-1005}.

Powell testified as to two meetings he claimed to have had with petitioner on May 11, 1981, the day before the Crake homicide. Powell stated that at 8:30 or 9:00 a.m. that morning petitioner provided him with Crake's address. Later that morning



following a second meeting with Petitioner, Powell claimed that he obtained the weapon subsequently taken by him to Crake's residence, from petitioner's vehicle. {RT 981-983, 1047-1048}.

James Harris Murphy, who was employed as a Deputy United States Marshall during May of 1981, and was also acquainted with petitioner, testified that he was telephoned by petitioner on the morning or afternoon of May 11 {RT 1742}. Petitioner asked Murphy to obtain an address and telephone number for Richard Crake because petitioner had papers to serve on Crake in connection with a pending lawsuit {RT 1743}. About six months earlier petitioner had called Murphy and asked him to verify an address for Crake {RT 1744}.

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Murphy forwarded the request to the fugitive detail of the Marshall's office, but did not receive the information requested until 3:30 p.m., at which time he forwarded the information to petitioner. {RT 1744-1746}. This was six to seven hours after Powell alleged that he received the address from petitioner.

The morning after the Crake homicide, while driving to work, Powell was arrested. {RT 1014}. Powell admitted at trial that he lied to police officers when he indicated to them that he had no involvement in Crake's death {RT 1014}.

The record reveals, through the testimony of Powell's girlfriend, Michelle Goff, and other acquaintances of Powell, i.e., Mark Adelman, president of Universal Consumer Benefit

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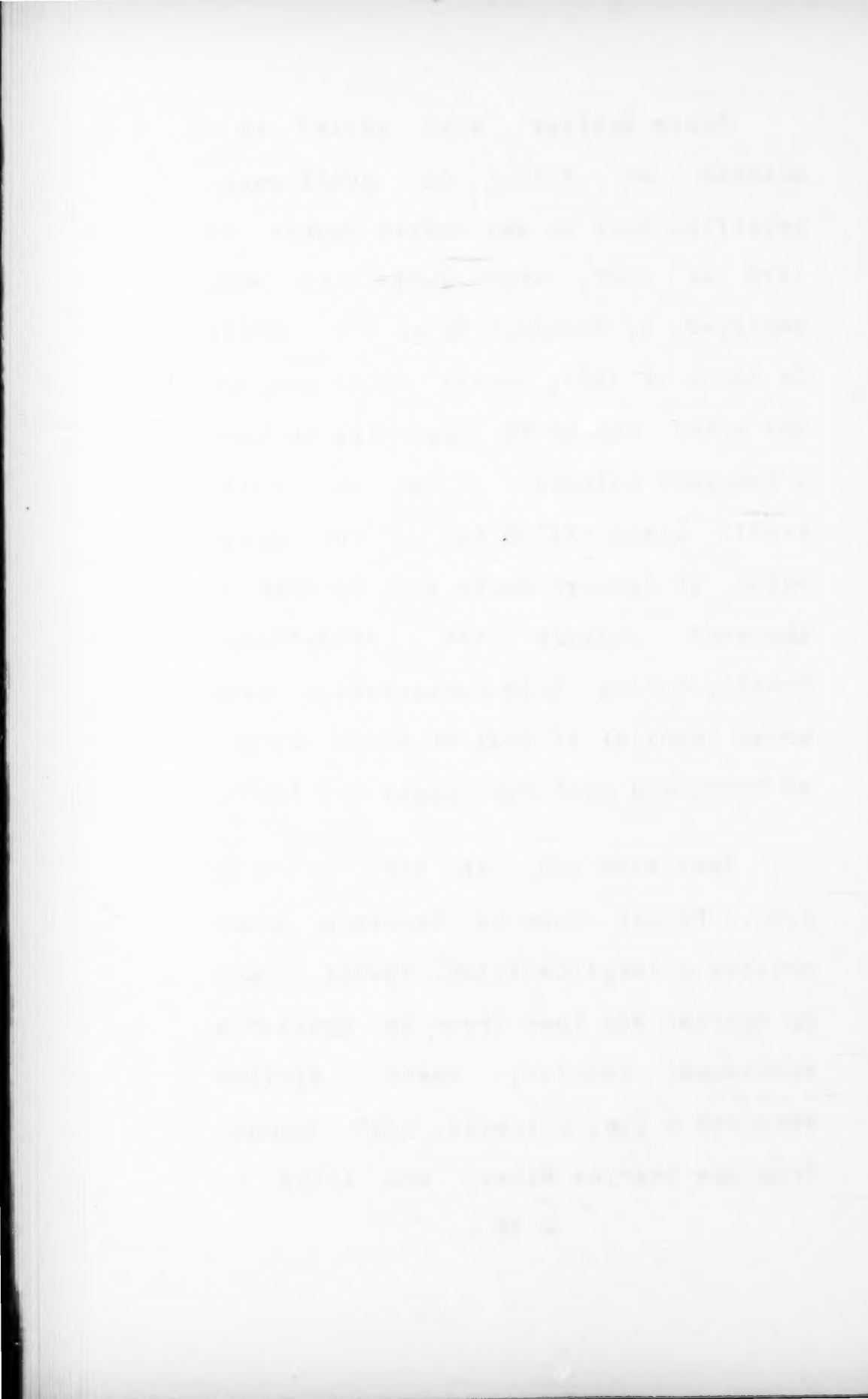
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Associates; Lowell English, a retired Marine Corps Major General; and Madelaine Payton, Powell's ex-wife, that Powell's reputation for truth and veracity was poor {RT 1999-2000, 2071, 2103}. However, the defense was not permitted to offer evidence relating to past statements of Powell tending to show that he was a pathological liar {RT 1035}, such as testimony that Powell told Michelle Goff that he played professional football for the Buffalo Bills for ten years and that he played cornerback, and that he also played in Philadelphia and Baltimore; that he told Goff that he was having trouble collecting his retirement money from the he National Football League {PHT 55, 168}; and that he also apparently lied at the preliminary hearing as to where he went to college {PHT 54, 363}.



Steve Aguilar, also called as a witness on behalf of petitioner, testified that he met Andrew Powell in 1979 or 1980, when they both were employed by Harrison Buick {RT 1901}. In March of 1981, Powell called Aguilar and asked him if he would like to make a thousand dollars. On May 11, 1981, Powell again called Aguilar and again asked if Aguilar would like to make a thousand dollars {RT 1901-1902}. Powell, during this conversation, also asked Aguilar if Aguilar could obtain an "unmarked gun" for Powell {RT 1903}.

That same day, at 1:00 or 1:30 p.m., Powell came to Harrison Buick driving a large Cadillac. Powell picked up Aguilar and they drove to Aguilar's apartment complex, where Aguilar obtained a gun, a loaded .357 Magnum, from one Charles Riley, who lived in



Aguilar's complex. {RT 1903-1905; 1930, 1938}.

The following day, Aguilar learned that there was "a murder. . . in La Jolla" and that Powell had been arrested. Aguilar held the gun for a week, strongly suspecting that the weapon was used by Powell in the murder; he then disposed of the gun in a dumpster because he was "too frightened to even think" {RT 1951-1952}.

Following his testimony at trial, Steven Aguilar was placed under arrest while leaving the courtroom in front of other defense witnesses.

San Diego County Superior Court records reveal no charges ever being filed against Aguilar in connection with this arrest. Aguilar was released

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PART 2  
1880



on his own recognizance the day following his arrest, and the Court reprimanded the District Attorney on the record for the arrest of Aguilar. {RT 1995-1996} Subsequently, several defense witnesses refused to testify, and asserted their privileges against self-incrimination. {RT 2050-2060, CT 300-301.}

Exhibits lodged with the trial court and the Court of Appeal indicated that one of these witnesses, Charles Riley, would have corroborated the testimony of Steven Aguilar regarding where Powell obtained the murder weapon; and that two other witnesses who refused to testify at trial, John Gross and Eugene Wallace, who were acquainted with Powell, would have testified that Powell fabricated his story implicating appellant in the



Richard Crake homicide. Trial counsel, citing these court's exhibits, requested at trial that these witnesses be granted immunity by the trial court, after the District Attorney refused to grant such immunity {RT 2052}, but this request was denied {RT 2052-2056}. This denial of petitioner's right to call witnesses on his behalf was raised by petitioner in a motion for a new trial, which was denied on May 14, 1982 {CT 255, 312}. This issue was also presented to the Court of Appeal in 4 Crim. 13945.

Also, in the course of his closing argument, the prosecutor invited the jury to speculate if it would find petitioner guilty "if neither [petitioner nor Powell] testified" {RT 2300-2301}

Petitioner, who did not testify at



trial, moved through his counsel, for a mistrial pursuant to this Court's opinion in Griffin v. California {1965} 380 U.S. 609, noting that the prosecutor's comment "was a direct comment on my client's failure to testify" {RT 2301-2302}. This motion was denied by the trial court {2302}. Thereafter, the prosecutor, in describing Powell's alleged activities, asked the jury "Is there any other explanation for what Powell did?" {RT 2303}.

Petitioner's contention on appeal that the prosecutor's comment constituted prejudicial Griffin error, particularly in view of the prior testimony that appellant had allegedly stated that he would commit perjury rather than reveal his Department of Justice background in connection with



the deposition taken in a civil lawsuit {RT 1804}, was rejected by the Court of Appeal {Appendix "A", page 39}.

Finally, the record reveals that both in the course of the prosecutor's case in chief and during summation the prosecutor repeatedly and improperly attempted to associate petitioner with the "Mafia" in the minds of the jurors {RT 1627; 2222-2223; 2230-2231}. Defense motions for a mistrial based upon such misconduct were denied by the trial court {RT 1628, 2230-2231}. The issue was also presented to the Court of Appeal in 4 Crim. 13945.

the Department of the Interior  
Washington, D. C.  
February 10, 1901

Mr. J. M. Smith, Secretary  
of the Interior  
Washington, D. C.

Sir:

I have the honor to acknowledge the receipt of your letter of the 1st inst. in relation to the proposed extension of the public lands in the State of Nevada. The same has been forwarded to the proper authorities for their consideration. I am, Sir, very respectfully,  
Yours very truly,  
J. M. Smith



## ARGUMENT

I. THE DECISION OF THE COURT OF  
APPEAL FUNDAMENTALLY MISCONSTRUES  
THIS COURT'S HOLDING IN  
GRIFFIN V. CALIFORNIA  
AND SUBSEQUENT FEDERAL  
AUTHORITIES  
INTERPRETING GRIFFIN

The trial record reveals that in  
the course of his closing argument to  
the jury, the prosecutor made the  
following comment:

"Let me suggest to you  
that you consider this case  
in that light for a while.  
Consider your job as finding  
whether or not Andrew Powell  
and Herman G. Martin are  
guilty of count I, conspiracy  
to commit extortion and count  
II, and count III and count  
IV, both of them are sitting  
over there on trial. Neither  
one of them testified. No  
testimony from either of the  
co-conspirators..." {RT  
2300-2301}{emphasis added}

Defense counsel, correctly noting

THE DISTANCE IS NOT KNOWN  
 FROM THE POINT OF ORIGIN  
 TO THE POINT OF DESTINATION  
 BUT THE DISTANCE IS KNOWN  
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that the prosecutor's argument was a direct comment on petitioner's failure to testify, made a motion for a mistrial, which was denied {RT 2301-2302}.

Shortly thereafter, in arguing that petitioner was guilty of the offense charged, the prosecutor followed up his previous comment with the question "Is there any other explanation for what Powell did?" {RT 2303}.

Petitioner submits that the prosecutor's conduct in this case was blatant Griffin error {Griffin v. California {1965} 380 U.S. 609}, and that the failure of the Court of Appeal to so hold and to reverse the judgments of conviction against petitioner were incorrect and misconstrued the holding of this Court in Griffin.

and the Government's right to  
take property in the public interest  
is a matter of course. It is  
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It is by now settled that a prosecutor may not comment on a defendant's failure to take the stand and testify in his own behalf. Griffin, supra, at page 615. In Rachel v. Bordenkircher (6th Cir. 1978) 590 F.2d 200, 202 the Court noted that:

"Such conduct [prosecutor's comment on the defendant's failure to testify] was condemned by the United States Supreme Court over 85 years ago in criminal cases, Wilson v. United States 149 U.S. 60 {1893} and over 13 years ago in state criminal prosecutions, Griffin v. State of California 380 U.S. 609 {1965}. We would have hoped that the condemnation received in the Supreme Court would have been sufficient to bar such conduct from a courtroom forever."

Citing Griffin, supra, the Rachel court went on to note that:



"[C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice'. . . which the Fifth Amendment outlaws. It is a penalty imposed by the Courts for exercising the constitutional privilege. It cuts down on the privilege by making its exercise costly." {at page 202}.

In the face of the foregoing principles, and in spite of them, the Court of Appeal, Fourth Appellate District, cavalierly dismissed petitioner's assignment of Griffin error with the following language:

"In this case, the prosecution merely stated the obvious; he simply noted the difficulty proving a conspiracy is that it must often be proved by circumstantial evidence because the conspirators frequently do not testify. [footnote omitted].

It is hard to see [sic] the argument focused attention on Martin's failure

11th November 1914  
The following is a list of the  
names of the persons who have  
been appointed to the various  
committees of the Council of the  
University of London, for the  
year 1914-15.

The Council of the University of London  
has appointed the following persons  
to the various committees for the  
year 1914-15.

The Council of the University of London  
has appointed the following persons  
to the various committees for the  
year 1914-15.

The Council of the University of London  
has appointed the following persons  
to the various committees for the  
year 1914-15.



to testify by asserting that even without Powell's testimony, sufficient evidence supported a finding of conspiracy. The trial court's instructions telling the jury that Martin's failure to testify could not be used to infer his guilt would have cured any potential harm from this limited comment." (Appendix "A", pages 37-39)

The above language, which appears in a published opinion and which declines even to acknowledge that Griffin error occurred, misanalyzes the Griffin problem and is irreconcilable with this Court's opinion in Griffin and with subsequent federal authorities interpreting that decision.

Clearly, in order to constitute Griffin error, the comment in questions need not expressly assert that the defendant's failure to testify should be considered as an indication of his guilt. See, e.g., United States v.



Hendershot {9th Cir. 1980} 614 F.2d 648, 651. The test for determining whether Griffin error occurred in the first instance was set forth in Myer v. Estelle {5th Cir. 1980} 621 F.2d 769, 773. That test is, whether the comment is "manifestly intended or of such character that a jury would naturally take it to be a comment on the failure to testify." {Myer v. Estelle, supra at page 773; emphasis added}.

Accordingly, regardless of the context in which the improper comment appears, Griffin error will nonetheless be deemed to be present if the comment is such that a jury would naturally take it to be a comment on the defendant's failure to testify. Thus, even assuming arguendo, that the prosecutor's comment in this case was

Memorandum for the President  
and the Vice President  
dated 1941. The purpose of this  
document is to inform you of the  
status of the project and to  
recommend that you approve the  
proposal for the project.

The project is a study of the  
effect of the new law on the  
economy. It is a study of the  
effect of the new law on the  
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intended for the purpose of illustrating "the difficulties proving conspiracy", such comment was nonetheless Griffin error because its purpose was to invite the jury to analyze the evidence in view of the fact that petitioner did not testify on his own behalf, and to argue that absent petitioner's testimony, the evidence was sufficient to sustain a conviction {RT 2301, lines 23-25}. In so arguing, the prosecutor mentioned petitioner by name and specifically drew attention to the fact that petitioner did not testify. Following the Court's denial of petitioner's motion for a mistrial, which was not accompanied by an admonition to the jury, the prosecutor shortly thereafter asked the jury "is there any other explanation for what Powell did?" {RT 2300-2303}, thereby removing any



possibility that the jury, however else it may have construed the prosecutor's comment, would not consider petitioner's silence as an indication that petitioner must have "something to hide".

Here, the District Attorney's disingenuous and not-so-subtle mechanism for calling the jury's attention to petitioner's failure to testify, sanctioned by the Court of Appeal, set petitioner up before the jury as the one individual who was in a position to controvert Andrew Powell's testimony, but who failed to take the stand. As the Court of Appeal noted in its majority opinion {Appendix "A", page 51}, "Powell's testimony as a co-conspirator was pivotal".

Under these circumstances, it is apparent that the prosecutor was making





a clever, albeit improper, reference to petitioner's failure to provide an explanation for the testimony provided by Andrew Powell. The prosecutor thereby invited the jury to infer that petitioner was probably guilty of the offenses charged.

Moreover, the error in this case was clearly prejudicial. See, Chapman v. California {1967} 386 U.S. 18, 24. Although the case law describes various situations in which Griffin error, although present, is harmless, these situations are not analogous to the present case. As indicated, this case does not present a situation in which the jury would not necessarily view the District Attorney's comments as a reference to the defendant's failure to testify. {See, Weddell v. Meierhenry {8th Cir. 1980} 636 F.2d 211, 214}. The



specific comment on petitioner's failure to testify is patent and unmistakable. Nor does the instant case involve an isolated incident of prosecutorial misconduct (see United States v. Passaro (9th Cir. 1980) 624) or a situation in which there was a prompt curative instruction forthcoming from the trial court (compare, United States v. Hendershot, supra, at pages 651, 654).

The instant case was extremely close factually and turned, as previously indicated, both in this petition and by the Court of Appeal, on the testimony of Andrew Powell. Powell's credibility, obviously, was an issue throughout the trial. Because petitioner was the one person possessed of the particular knowledge necessary to controvert the "facts" testified to



by Powell, the prosecutorial comment on petitioner's failure to testify was particularly devastating. Petitioner herein was entitled to have the jury decide his case on the basis of the credibility of the key witness against him, and of course, was not required to take the stand to prove his innocence. As this court stated in Wilson v. United States, supra:

"... The act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to everyone, and not wish to be witnesses. It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character and offences charged against him, will often confuse and embarrass him to such degree as to increase rather than remove prejudices against



him. It is not everyone, however honest, who would, therefore, willingly be placed on the witness stand. The [California] statute in tenderness to the weakness of those who from the causes mentioned, might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their associations with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him." See also, Griffin v. California supra at page 613.

The foregoing language is particularly applicable to petitioner in the instant case. It will be recalled that in the course of petitioner's trial, the prosecution was allowed, over defense objection, to present evidence that in the course of a deposition relating to a civil case, petitioner stated that he would commit perjury rather than reveal details about his background and work for the

the 15th and 16th of  
November, 1911, the  
California State  
Legislature passed  
a bill to amend  
the constitution  
of the State  
relating to the  
election of  
judges of the  
Supreme Court  
and Justices  
of the Appellate  
Court, and to  
provide for the  
election of  
judges of the  
County Courts  
and Justices  
of the County  
Clerks.

The bill was  
passed by the  
Legislature on  
November 15, 1911,  
and was signed  
by the Governor  
on November 16,  
1911. The bill  
amends the  
constitution of  
the State in  
several places,  
relating to the  
election of  
judges of the  
Supreme Court  
and Justices  
of the Appellate  
Court, and to  
provide for the  
election of  
judges of the  
County Courts  
and Justices  
of the County  
Clerks.



Department of Justice. Accordingly, petitioner had already been improperly branded a perjurer in the course of the prosecution's case in chief and prior to the advent of any opportunity to take the stand in his own behalf. Significantly, petitioner's prospective credibility was further impugned in the course of the trial when the prosecutor offered the testimony of convicted felon Steven Jarrett to the effect that petitioner had told him that he {petitioner} knew two individuals who were friends of Powell who could clear the matter up, and that he {petitioner} offered these individuals \$5,000.00. {RT 1872-1873}. The prosecutor was thereafter allowed to speculate, in the course of closing argument, without foundation and over defense objection, that petitioner had unsuccessfully attempted to bribe these witnesses.



{RT 2310}. Previously the prosecutor had been allowed to suggest that petitioner was associated with the "Mafia" {RT 2222-2223, 2230, see, Argument III, infra}

A similar situation was presented in Eberhardt v. Bordenkircher {6th Cir. 1979} 605 F.2d 276, 277-278 and contributed to a finding by the Court in that case that Griffin error occurring therein was prejudicial.

These circumstances, coupled with the repeated acts of misconduct by the prosecutor and the failure by the trial court to provide any cautionary admonition in the face of such comments, resulted in prejudicial Griffin error and violated petitioner's privilege against self-incrimination and right to due process of law under the 5th and 14th Amendments to the



**United States Constitution.**

For the foregoing reasons, petitioner submits that the published opinion of the Court of Appeal in the instant case cannot be allowed to stand and that a Petition for Writ of Certiorari should issue to review this decision.

For the purpose of the  
Constitution, the following  
shall be the basis of the  
Government of the United States  
in all its actions and in the  
exercise of its powers. The  
Government shall be a  
Union of the States, and  
shall be a Government of the  
People.

II. THE OPINION OF THE COURT OF APPEAL IS INCORRECT INsofar AS IT FINDS THAT THE TRIAL COURT'S REFUSAL TO TO GRANT IMMUNITY TO MATERIAL DEFENSE WITNESSES WAS NOT VIOLATIVE OF PETITIONER'S SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS

In the trial court, outside the presence of the jury, three potential witnesses, i.e., Charles Riley, John Gross, and Eugene Wallace, were allowed to assert their Fifth Amendment privileges against self-incrimination {RT 2050-2060; CT 300-301}. This occurred after another key defense witness, Steven Aguilar, had been arrested and released by the prosecutor without charges being filed, in full view of other defense witnesses {RT 1995-1996}.

Court's exhibits lodged with the trial Court and transmitted to the

THE OFFICE OF THE CLERK OF THE  
COURT OF THE DISTRICT OF COLUMBIA  
AND THE DISTRICT COURT OF THE  
DISTRICT OF COLUMBIA  
DO HEREBY CERTIFY THAT THE  
FOLLOWING IS A TRUE AND CORRECT  
COPY OF THE ORIGINAL AS FILED  
IN THE OFFICE OF THE CLERK OF THE  
COURT OF THE DISTRICT OF COLUMBIA  
ON THE 10TH DAY OF JANUARY 1900  
AT WASHINGTON, D. C.

IN THE DISTRICT COURT OF THE  
DISTRICT OF COLUMBIA  
IN AND FOR THE DISTRICT OF COLUMBIA  
IN THE MATTER OF THE ESTATE OF  
JOHN A. BROWN, DECEASED  
ADMINISTRATOR  
VS  
THE DISTRICT OF COLUMBIA  
PLAINTIFF  
VS  
THE DISTRICT OF COLUMBIA  
DEFENDANT  
JURY TRIAL  
VERDICT  
IN FAVOR OF THE PLAINTIFF  
BY A UNANIMOUS JURY  
THE DISTRICT COURT OF THE  
DISTRICT OF COLUMBIA  
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AT WASHINGTON, D. C.



appellate court pursuant to Rule 10(d), California Rules of Court indicate that Riley would, in substance, have corroborated testimony of defense witness Steve Aguilar to the effect that Riley gave Aguilar a .357 Magnum on May 11, 1982 which weapon in turn was given to Andrew Powell, the perpetrator of the crime. Gross would have testified that Powell told him that petitioner was not involved in the Crake homicide, that Powell told Gross that Aguilar gave Powell the gun; and that Wallace and Powell had fabricated the story about petitioner being involved in the homicide. Wallace would have testified that Powell told him that petitioner was not involved in the killings; that Powell and Wallace fabricated the story concerning petitioner's involvement; that Powell planned to extort money from



petitioner, and that Powell threatened Wallace and his family if Wallace testified in petitioner's case.

Petitioner's trial counsel asked that the trial court grant these witnesses immunity. The Court denied the request on the ground that it lacked the power to do so; it further indicated that even if it had the power, it would not exercise it due to "the gravity of the situation." The Court so ruled, even though counsel had asserted that the court could grant "use", as opposed to "transactional", immunity {RT 2052}.

Thereafter, the District Attorney verified that he had no intention of granting immunity to these witnesses {RT 2055}.

Petitioner submits that the trial

1871-1872

1872-1873

1873-1874

1874-1875

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1891-1892

court's ruling was improper because {1} the trial court in fact had the power to grant witness immunity on its own motion, or at least to order that the prosecutor grant such immunity, and {2} such power extended to the granting of "use" immunity, which would not necessarily have precluded the People from prosecuting the witnesses in question, but would merely have precluded the use of their testimony against them in any subsequent prosecution.

Petitioner's contention was brought to the attention of the Court of Appeal and was rejected by that Court. The Court of Appeal observed that although

"There is federal and California precedent for limited judicially declared use immunity, no case has



been cited which would permit a trial court to require a witness to testify after his assertion of the Fifth Amendment privilege. In view of the scant authority and the Legislature's express delegation of the authority to grant immunity to the prosecution, there was no abuse of discretion in the trial court's ruling." {Appendix "A", at pages 25-26}.

The Court of Appeal's reliance on the "scant authority" permitting a trial court to "require a witness to testify after his assertion of the fifth amendment privilege..." ignores the very same "federal and California precedent for limited judicially declared use immunity..." to which the court itself made reference. While it may be true that there is little authority authorizing a trial court to grant immunity, the fact is that the court is vested with the authority and often times the duty to compel the

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prosecution to grant immunity to a potential defense witness in the appropriate case. Indeed, the area of "judicially declared use of immunity" to which reference is made by the Court of Appeal is a rapidly emerging area which has received increasing attention in the form of numerous recent decisions, both federal and state. Such cases suggest that where the District Attorney acts to subvert the fact-finding process by refusing to grant a witness use immunity for his testimony, the prosecutor must grant said defense witness immunity or suffer an acquittal. (See e.g., *United States v. Lord* (9th Cir. 1983) 711 F.2d 887,890, citing *United States v. Morrison* (3rd Cir 1976) 535 F.2d 223; *People v. Robinson* {1983} 134 Cal.App.2d 962, all cited to the Court of Appeal; also, *Virgin Islands v. Smith* {3rd Cir.



1976) 515 F.2d. 964; United States v. Herman (3rd Cir. 1978) 589 F.2d 91.

United States v. Morrison *supra*, is remarkably similar to the present case. There the prosecutor confronted a witness outside of the courtroom and threatened that witness with prosecution if she incriminated herself in any way. In Morrison, the witness subsequently refused to answer a number of questions and the defendant was convicted. The Court in Morrison reversed, holding that the defendant was denied a fair trial and was deprived of his constitutional right to call witnesses in his defense by the actions of the prosecutor. The Court remanded the case with instructions to enter a judgment of acquittal unless the government offered use immunity to the witness.



In the instant case a key defense witness Steven Aguilar was arrested in full view of other defense witnesses. Later Aguilar was released by petitioner's prosecutor without charges being filed.

Also in the present case, through Court's exhibits which were lodged with the trial court but not viewed by the jury, the prosecutor, fully aware of the materiality of the witnesses in question, nonetheless refused to offer immunity to three prospective defense witnesses. (RT 2055-2056). In view of defense counsel's suggestion that the witnesses could be granted use immunity, as opposed to transactional immunity, there was absolutely no danger under the circumstances, that had the prosecutor granted the immunity request, his ability to prosecute the



witnesses in question would have been impaired. While the California Supreme Court in Daly v. Superior Court (1977) 19 Cal.3d 132, 148, expressed concerns about the possibility that even the grant of use immunity could hamper the prosecution of witnesses due to potential difficulties in determining whether information discovered in the course of the prosecution and investigation is obtained as a result of the testimony in question, neither the trial court nor the Court of Appeal in the instant case had occasion to address this issue. Moreover, the California courts have held that in extraordinary situations, the judiciary has the power to compel transactional immunity, in cases in which the prosecution objects. For example, in People v. Brunner (1973) 32 Cal.App.3d 908, 915, the California Court of





Appeal held that a promise by the prosecution to grant immunity to a witness, even though not made in compliance with statute could be specifically enforced against the prosecution where the witness relying on the promise testified truthfully for the prosecution in a criminal case. Such a result could only have been reached, if submitted, by balancing the witness' privilege against self-incrimination against the concept of the separation of powers clause, in determining that the privilege against self-incrimination must prevail.

Indeed, the Federal Courts have recognized the propriety of balancing competing interests in making the determination of whether a witness should be granted immunity.

In deciding whether or not a court



has the inherent power to grant immunity upon the request of a defendant, it should consider the question of public confidence in the fair and honorable administration of justice, upon which ultimately depends upon the rule of law. That is the transcending value at stake. Sherman v. United States (1958) 356 U.S. 369, 380.

Since United States v. Nixon (1974) 418 U.S. 683, 711, it is obvious that the courts are now permitted to weigh the specific interest of the executive in the particular exercise of its prosecutorial prerogative against the specific needs of the parties in a criminal case. If the court may, since the Nixon decision, supra, balance competing needs in determining whether or not a requested grant of immunity is



to be allowed, surely the converse is true and it may, upon an ample showing in the interest of fundamental fairness, grant immunity at the request of the defense. The basic tenant that all actions of the courts are limited by the doctrine of "fundamental requirements of fairness" cannot now be ignored (Rovario v. United States {1957} 353 U.S. 53 59-60.)

At this late date, it cannot be denied that Brady v. Maryland {1963} 373 U.S. 83, has established a general due process theory which entitles every defendant as a matter of right to all the evidence which is the essential element of any fair trial. In view of that holding, and the now common theory of the law that a defendant as a matter of due process must be provided with evidence favorable to his position, it



seems hollow indeed to argue that the Government may refuse or a court, upon due application, may ignore, a proper request for immunity once the basis for that grant has been clearly shown as is the case on the record now before us. The Sixth Amendment to the Constitution guarantees a defendant access to potentially exculpatory evidence even where the state asserts some important interest in withholding that interest.

This Court has also recognized that in a rare variety of offenses, the very nature of the crime is such that the only person capable of providing any useful testimony is one who is implicated in some way in the very commission of the crime. Obviously, a man falsely accused of being involved along with those who actually were involved, requires the services of





those individuals if he is to prove his innocence. Competing interests between the state and the defense and the basic concept of fundamental justice require that any person falsely accused of a crime be given the same rights as the Government would have, allowing those who are indeed implicated to stand forth and testify honestly and truthfully without fear of prosecution for the underlying offense about which they are speaking. Kastigar v. United States {1972} 406 U.S. 441, 446. This is especially true where the prosecutor, as in this case, arrested a key defense witness in full view of other defense witnesses in an obvious attempt to subvert the fact-finding process.

Petitioner submits that such a balancing test as described above, is



necessarily applicable here. Obviously, the competing interests at stake are, the petitioner's constitutional right to a fair trial and rights under the Sixth Amendment to the United States Constitution, and the witness' privilege against self-incrimination. Under the circumstances of this case, there can be no question that petitioner's right to a fair trial must prevail. On the one hand, the offer of proof below affirmatively shows that the requested immunity was necessary and that its denial deprived petitioner of a fair trial. On the other hand, the record is devoid of any showing that had use immunity been granted to the witnesses in question, the prosecution of such witnesses would have been hampered in any way.



Clearly, the facts situation in the instant case is almost identical to that found in Morrison, supra, and calls for this court to exercise the same remedies. Here, the District Attorney's decision to refuse to grant immunity to defense witnesses {RT 2055}, was made without any showing of a countervailing interest on the part of the prosecution, with full knowledge of the materiality and importance to the defense of the proposed testimony {RT 2056}, and effectively resulted in the suppression of exculpatory evidence. The evidence in question was clearly material, contrary to the opinion of the Court of Appeal {at pages 24-25}, because it tended to discredit the prosecution's chief and indispensable witness. See, this Court's opinion in Giglio v. United States {1971} 405 U.S. 150, 153; also,



this Court's opinion in Brady v. Maryland supra at page 87, wherein this Court held that the suppression of material evidence justifies a new trial "irrespective of the good or bad faith of the prosecution."

To conclude, there is ample case law supporting the proposition that the trial court is authorized to compel the prosecutor to grant a witness immunity in the appropriate case, and is duty bound to carefully weigh the competing interests at stake. Where the prosecutor, regardless of the exercise of good or bad faith on his part, acts to subvert the fact-finding process, the cases indicate that the balance must be tipped in favor of the accused and the material defense witnesses must be made available or the prosecution must suffer an acquittal.





In the present case, the Court of Appeal, either ignoring or forswearing the very case law in this area which has its origin in this Court's opinion in Brady v. Maryland, supra, effectively found that petitioner's Sixth Amendment right to compel compulsory process of witnesses was counterbalanced by some competing prosecutorial interest even though such countervailing interest was not demonstrated in the record.

A Petition for Writ of Certiorari should therefore issue to review the opinion of the Court of Appeal, particularly in view of the confusion, evidenced by that Court of Appeal in its Opinion, which apparently has resulted from the very recent and predominantly federal decisions appearing in the area of judicially



created use immunity.



III. PETITIONER WAS DEPRIVED OF  
HIS FUNDAMENTAL RIGHT TO  
A FAIR TRIAL AND TO DUE  
PROCESS OF LAW BY VIRTUE  
OF THE PROSECUTOR'S REPEATED  
AND IMPROPER ATTEMPTS TO  
ASSOCIATE PETITIONER WITH  
ORGANIZED CRIME FIGURES  
IN THE COURSE OF PETITIONER'S  
TRIAL

The trial record reveals, in addition to the blatant Griffin error occurring in the course of the prosecutor's summation, that the prosecutor on repeated occasions in the course of the trial and in the face of defense objection, improperly attempted to associate the petitioner herein with the "Mafia" in the minds of the jurors. The first reference was solicited by the prosecutor during the examination of Deputy District Attorney Charles Hayes, regarding Hayes'

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WASHINGTON, D. C.  
1900

discussion with petitioner. Hayes, when questioned about statements made by petitioner about petitioner's background, stated "he [petitioner] said, .... he was connected with the Department of Justice. I asked him whether he was acquainted with the Mafia activities in New Jersey and he said - ..." {RT 1627}.

A defense objection to the question was sustained and the question was stricken. The court admonished the District Attorney to "straighten out your witness". A defense motion for mistrial was denied. {RT 1628}.

Thereafter, in the course of his summation, the prosecutor analogized petitioner to the fictional character "The Godfather", and likened petitioner to a puppeteer who was pulling the strings of defense witnesses {RT

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M. SMITH  
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2222-2223}. Shortly after these comments were made, the prosecutor administered his coup de grace by analogizing the perpetrator of the murder herein, Andrew Powell, to Mafia "hit man" Jimmy Fratianno {RT 2230}.

A defense objection to these remarks was sustained; appellant's motion for a mistrial was denied {RT 2230-2231}.

In finding that the prosecutor's conduct did not require reversal, the Court of Appeal, Fourth Appellate District concluded that such comments did not amount to a dishonest act or attempt to dissuade the jury by deceptive or reprehensible means {Appendix "A", pages 42-43}. Yet the opinion offers no other rational explanation for the prosecutor's comments, and acknowledges that "This



illustration [referring to the district attorney's attempts to analogize to the "Godfather" during closing argument], {RT 2222-2223}, was unnecessary and may have been offered in bad faith." {Majority Opinion, Appendix "A", at page 42}.

It should not be forgotten that the district attorney was well aware of the fact that petitioner had in the past provided faithful service to the United States Government and the Department of Justice in particular. {See e.g., CT 230, 231; RT 1627}.

The use of such improper insinuations and suggestions by the prosecutor to influence the jury's verdict as occurred in this case and which were objected to by petitioner has long been condemned by this court. In Berger v. United States {1934} 295



U.S. 78, 88 this court observed that:

"The [prosecutor] is the representative not of an ordinary party to a controversy, but of the sovereignty whose obligation to govern impartially is as compelling as its obligation to govern all; and whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape nor the innocent suffer.... while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce wrongful convictions as it is to use every legitimate means to bring about a just one ...."

Among the factors to be considered by the court in determining whether the use of improper methods by the district attorney in influencing a jury results in a denial of due process is the



strength of the case against the defendant as well as the nature and frequency of the misconduct. {See, this court's opinion in Berger, supra, at page 89; judgment reversed in a conspiracy prosecution due to the relative weakness of the case and the "probable cumulative effect upon the jury which cannot be disregarded as inconsequential", of misconduct which was "pronounced and persistent"; see also, Petition of Hamilton {9th Cir. 1983} 721 F.2d 1189, 1195 wherein the court, citing Chapman v. California {1967} 386 U.S. 18, 24 noted that the cumulative effect of the prosecutorial misconduct possibly affected the verdict, "therefore denying the defendant a fundamentally fair trial."}

In the present case, the opinion

1870-1871. The first year of the  
calendar at this time was the  
Chinese year of the dragon. The  
year was marked by a series of  
events which were of great  
importance to the people of  
the East. The first of these  
was the death of the Emperor  
of China, who had reigned for  
many years. This was followed  
by a period of civil war, which  
lasted for several years. The  
result of this was the  
establishment of a new  
dynasty, which was known as  
the Qing Dynasty. This  
dynasty was the last of the  
imperial dynasties of China.  
It was founded by a man  
named Hong Taiji, who was  
the leader of a group of  
tribes known as the Manchus.  
The Manchus were a people  
who lived in the north of  
China. They were of the  
Tungusic race, and they  
were known for their  
military prowess. Hong  
Taiji was a great warrior,  
and he was able to  
conquer the Ming Dynasty,  
which had been the ruling  
dynasty of China for  
many years. The Manchus  
then established their  
own dynasty, and they  
ruled China for over  
200 years. The Qing  
Dynasty was a very  
important dynasty in  
the history of China, and  
it was the last of the  
imperial dynasties.



of the Court of Appeal on its face, refuses to consider the cumulative effect of the above-described errors on the fairness of petitioner's trial. Apart from the fact that the unsupported inferences raised by the district attorney, which invoked the spectre of the "Mafia" in the context of appellant's case and thereby played upon powerful negative emotions which many citizens have been conditioned to feel toward the "Mafia", the improper conduct of the district attorney is particularly devastating in view of the subsequent Griffin error perpetrated by the prosecutor subsequently in the course of his summation (see argument I). By effectively branding petitioner as a likely perjurer in the course of the prosecution's case in chief and before petitioner even had the opportunity to take the stand in his



own behalf {the Noel testimony, see argument I}, and then by improperly associating petitioner with the negative and inflammatory feelings entailed in such association, the prosecutor effectively precluded any chance that a fair verdict could be reached when he reminded the jury that petitioner in fact failed to testify. In effect, the prosecutor herein reaped the best of both worlds; he was not only permitted by the court to comment on the defendant's failure to testify, but was also improperly allowed to brand the petitioner as an unsavory character and a liar without the jury even having the opportunity to hear testimony from petitioner. Of particular significance is the fact that petitioner was effectively procluded from testifying by the improper admission of prosecution

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ninety-seventh, the ninety-eighth, the ninety-ninth, the hundredth.

evidence in the first instance. {i.e., the "Noel testimony" and the "Hayes testimony"}.

Clearly, the case against petitioner herein was extremely close. As was the case in Berger, supra, petitioner herein was tried on a conspiracy theory. Under no rational reading of the record, can it be said that the cumulative effect of the errors herein were nonprejudicial, or that there is not a reasonable possibility that a verdict more favorable to petitioner would have resulted absent the errors {see, Chapman, supra}.

Because the opinion of the Court of Appeal is contrary to this Court's opinions in both Berger and Griffin, and the principles set forth therein, a petition for writ of certiorari must

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issue.

CONCLUSION

For the foregoing reasons,  
petitioner respectfully requests that a  
petition for writ of certiorari issue.

Respectfully submitted,

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GERALD B. GLAZER  
Attorney at Law

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EMRY J. ALLEN  
Attorney at Law

ATTORNEYS FOR PETITIONER





## APPENDIX "A"



CERTIFIED FOR PUBLICATION

COURT OF APPEAL,

FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Court of Appeal-Fourth District  
FILED

Dec 23, 1983

KEENAN G. CASADY, Clerk

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Deputy Clerk

In re HERMAN G. MARTIN	)	4 crim. No.
	)	15681
on Habeas Corpus.	)	(Super. Ct. No.
	)	CR 56081)
<hr/> THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	
	)	4 Crim. No.
	)	13945
vs.	)	
	)	(Super. Ct. No.
HERMAN G. MARTIN,	)	56081)
	)	
Defendant and Appellant.	)	
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APPEAL from a judgment of the Superior Court of San Diego County, Donald W. Smith, Judge. Affirmed.

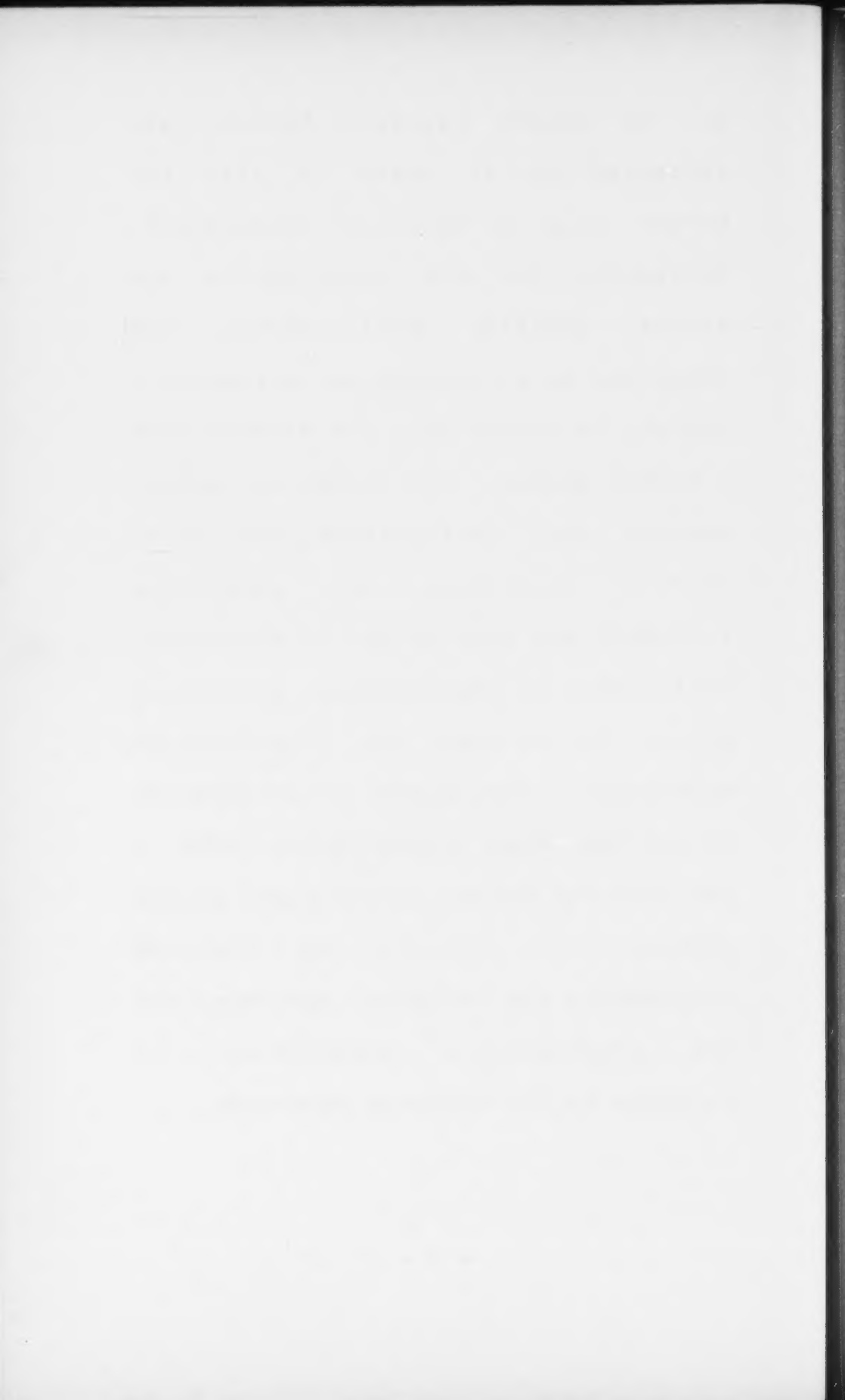
Gerald B. Glazer and Glazer and Allen for Defendants and Appellant.

John K. Van de Kamp, Attorney General, Patricia D. Benke and Louis R. Hanoian, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Herman G. Martin guilty of conspiracy to commit extortion {Pen. Code, Sections 182.1, 518}, conspiracy to commit assault with a deadly weapon {Sections 245, subd. {a}, 182.1}, murder {Section 187}, and simple assault {Section 240}. The jury also found Martin was armed with a firearm during the commission of the conspiracies and murder {Section 12022, subd. {a}}. The jury found the murder



to be second degree. Martin was sentenced to 15 years to life for murder plus a one-year enhancement. Sentencing for the conspiracies was stayed {Section 654}. Martin was sentenced to a concurrent six-month's custody in county jail for assault with a deadly weapon. The issues on appeal concern jury instructions, the trial court's discretion in permitting testimony and examination of witnesses, sufficiency of the evidence, a pretrial motion to dismiss, and prosecutorial misconduct. The appeal is accompanied by and has been consolidated with a petition for habeas corpus based on the prosecution's failure to disclose inducements for witness' testimony and the prosecution's suppression of evidence by intimidating witnesses.





## FACTS

La Jolla attorney Richard Crake was murdered by Andrew James Powell on May 12, 1981. The death was probably the result of a severe blow to the head. Briefly, in the light most favorable to the judgment, the evidence shows Martin and Crake were embroiled in civil litigation arising from a dispute over a real estate transaction at the Sports Arena Square shopping center. During the course of discovery Martin became dissatisfied with the posture of the litigation. During a deposition Martin had threatened Crake with violence.

Michelle Goff worked for Martin's insurance company. Powell was Goff's boyfriend and she introduced him to



Martin. Martin hired Powell on March 23, 1981. Martin knew Powell could not make his child support payments. Martin also knew Powell was afraid he would be jailed for failure to pay. Martin used this as leverage and told Powell he wanted Powell to collect money Crake owed Martin. Martin told Powell to collect \$100,00 from Crake and to beat him up.

Martin gave Powell Crake's picture and business address. When Powell would not go to Crake's business, Martin supplied Crake's home address. Powell and a friend went to this address but discovered Crake no longer lived there. Powell called Martin long distance to tell him this address was incorrect.

Martin obtained Crake's new address by contacting United States

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Marshal James Murphy telling Murphy he needed the address to serve papers in conjunction with his civil suit. Murphy provided Martin with Crake's address. Martin gave this address to Powell along with the keys to Martin's car and a bag containing a gun.

Powell and a friend drove to Crake's house on May 12, 1981. They arrived at the guard station at approximately 9 p.m. Powell gave the guard a false name. The Crake family had returned from dinner approximately 9 p.m. Powell and his friend rang the doorbell and Crake answered. Powell sent the friend to the car and then told Crake he was there to collect \$100,000 for Martin. Powell and Crake got into a fight. Powell shot Crake in the arm with Martin's gun. Powell hit Crake in the head with the gun between



six and sixteen times. The blows eventually cause Crake's death. Crake's wife attempted to stop Powell but he pushed her away and fired the gun at her. Crake's daughter threw shoes and books at Powell.

Powell covered with blood returned to the friend's car. They drove to Powell's house where he made a toll call to Martin, telling him the dirty work was done. When Goff returned at 10 p.m. she found blood on the carpet, shoes in the bathtub, and blood on Powell's jacket. Powell disposed of the jacket and the gun in a nearby dumpster scheduled to be picked up the following morning.





## DISCUSSION

### I

#### Jury Instructions

Martin raises two challenges to the jury instructions: The first question is whether Martin was entitled to the instruction announced in People v. Yarber, 90 Cal.App.3d 895, rather than the standard CALJIC instruction No. 3.01. The California supreme Court has granted hearing in several cases presenting this issue.<sup>1</sup>

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1. People v. Beemon, Crim. 22525, hearing granted March 17, 1982, People v. Valenzuela, Crim. 22648, hearing granted June 16, 1982, and People v. Sims, Crim. 22952, hearing granted January 27, 1983.



This court follows the general rule following a long line of cases finding CALJIC No. 3.01 sufficient.

"As is said in People v. Ott {1978} 84 Cal.App.3d 118, at page 130. . . , 'aiding in the commission of the crime with knowledge of the wrongful purpose of the perpetrator eo ipso establishes the criminal intent . . . "the criminal intent of the aider and abettor is presumed from his actions with knowledge of the actors wrongful purpose" {italics added}' [citation]. We might add to these truths the observation that since our system of justice entrusts to the jurors the vast power of drawing any inference that can reasonably be drawn from substantial evidence and we forever bind ourselves to those inferences properly drawn, it would be demeaning of jurors' intelligence to instruct them, in addition, on the clear implication of intent that flows logically and necessarily from the words of CALJIC No. 3.01 standard instruction. The standard CALJIC No. 3.01 is all that is required." {People v. Flores, 128 Cal.App.3d 512,



Yarber, by its own holding, provides an instruction for exceptions to this general rule:

"The Ellhamer/Ott [People v. Ellhamer, 199 Cal.App.2d 777, 782; People v. Ott, 84 Cal.App.3d 118, 130] synthesis that intent is inferred from the knowledge of the aider and abettor of the perpetrator's purpose is sound, generally, as a matter of human experience, but we cannot extrapolate therefrom, as a matter of law [emphasis added], that the inference must be drawn. Intent is what must be proved; from a person's action with knowledge of the purpose of the perpetrator of a crime, his intent to aid the perpetrator can be inferred. In the absence of evidence to the contrary, the intent may be regarded as established. But where a contrary inference is reasonable -- where there is room for doubt that a person intended to aid a perpetrator -- his knowledge of the perpetrator's purpose will not suffice." (People v. Yarber, supra, 90 Cal.App.3d 895, 916; fn. omitted.)



The Yarber instruction is appropriate where there are facts to support an inference although defendant actually aided in the commission of the crime the defendant did not by this action intend to do so. Martin produces "no hinge or loop to hang a doubt on." CALJIC No. 3.01 was properly given.

Martin next argues the trial court's instructions on homicide created "hopeless confusion" in the minds of the jury by offering alternative theories: felony murder based on the felony of conspiracy and second degree murder as the result of Martin's responsibility for all the criminal conduct of his co-conspirator.

It is fundamental rule the jury





instructions must be read together and understood in context as presented to the jury. Whether a jury has been correctly instructed depends upon the entire charge of the court. {People v. Mardian, 47 Cal.App.3d 16, 46; People v. Flores, 115 Cal.App.3d 67, 83} We assume jurors are intelligent persons capable of understanding and correlating jury instructions. {People v. Yoder, 100 Cal.App.3d 333, 338; Flores, supra, 128 Cal.App.3d at p. 525.} On review even if an erroneous instruction is included reversal is required only when it appears the error was likely to have misled the jury. {People v. Mardian, supra, at p. 46; People v. Mayberry, 15 Cal.3d 143, 159; People v. Gordon, 10 Cal.3d 460, 470.}

Here, the entire case was



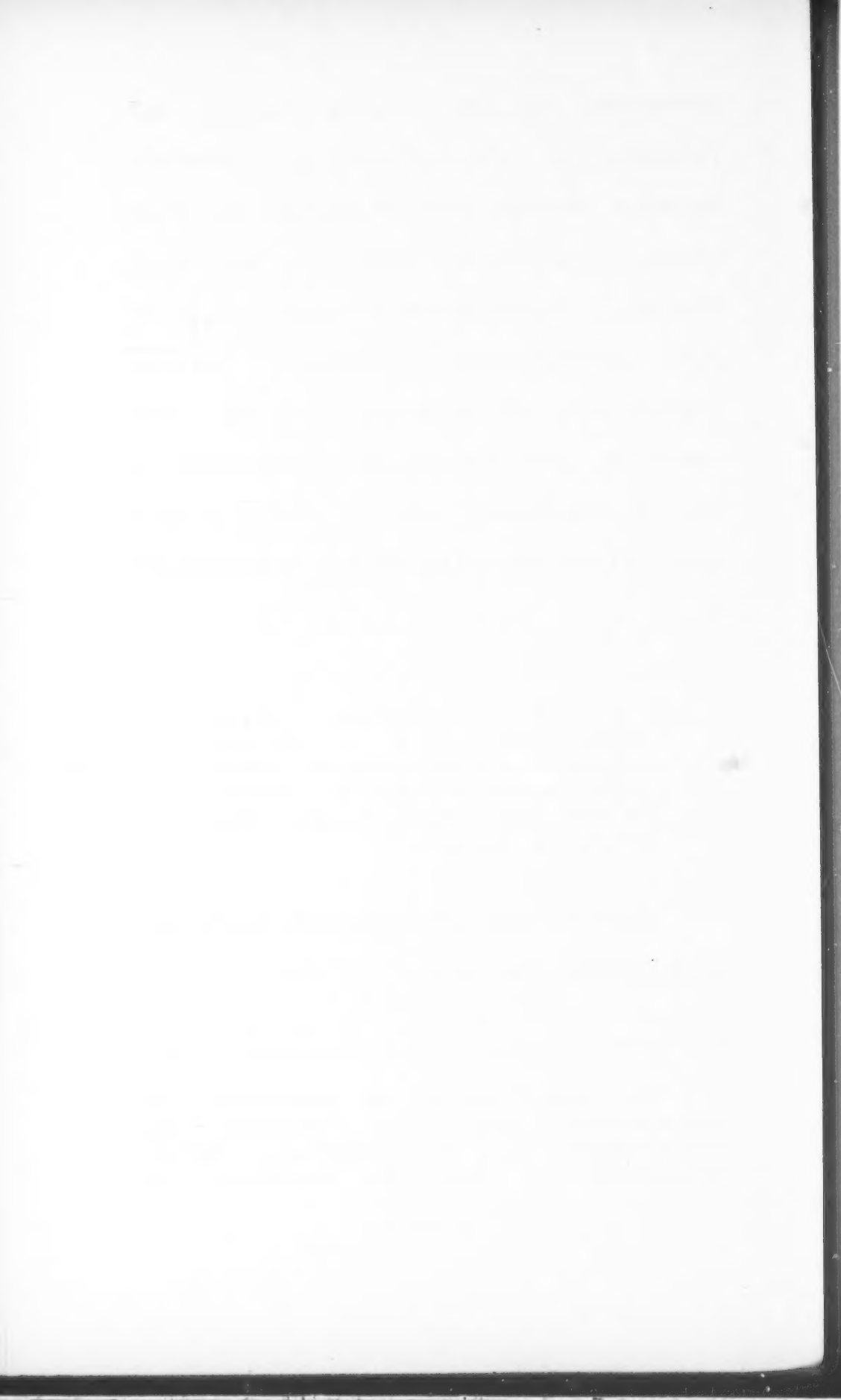
presented on the theory Martin was responsible for Powell's conduct because Martin coerced Powell to find Crake, collect the \$100,000, and beat him up. Approximately nine pages of jury instructions carefully define conspiracy, principals, aiding and abetting, the extent of responsibility for accomplices, etc. The single instruction causing Martin's complaint is:

"If a person while committing a felony inherently dangerous to human life causes another's death, malice is implied, and the crime is murder."

This single instruction would not have misled the jury.<sup>2</sup>

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2. Even though we conclude the instruction did not affect the correctness of the verdict, Martin requested it and the doctrine of



invited error precludes his complaint.  
{People v. Perez, 23 Cal.3d 545, 549,  
fn. 3.}



The trial court specifically instructed:

"The defendant is charged in Count III of the Information with the commission of the crime of murder, a violation of Section 187 of the Penal Code.

"Ladies and gentlemen, as has been argued here, and I will instruct you, that that has to be on the conspiracy theory if at all. And that it has to be a foreseeable part of that conspiracy, as I have defined it for you."

This comment clarifies for the jury Martin's responsibility is based on the acts committed in furtherance of and during the course of the crimes contemplated and not purely for the existence of the conspiracy itself.<sup>3</sup>





3. The law does not require direct proof of Martin's intent to murder. The conviction will stand even if a coconspirator did not contemplate all the acts necessary to achieve the aim of the conspirator and even though the coconspirator was not present at the time the acts were committed and did not know of the commission. (People v. Foster, 223 Cal.App.2d 275; People v. Brawley, 1 Cal.3d 277.) In Castro v. Superior Court, 9 Cal.App.3d 675, 693, the appeal court {Kaus} cited: "The stark fact of vicarious criminal liability for acts of coconspirators 'within the reasonable and probable consequences of the common unlawful design.' [Citations.] These may be acts, which, as such, may never have been contemplated by a particular member of the conspiracy." {Emphasis added; fn. omitted.} {See also People v. Kauffman, 152 Cal. 331, 334-336, vicarious liability for first degree murder where target crime of conspiracy was burglary; People v. Smith, 63 Cal.2d 779, 780-794; cf. People v. Durham, 70 Cal.2d 171, 181, distinguishing the intent required of an aider and abettor.)

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2. The second is the fact that the  
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15. The fifteenth is the fact that the  
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The trial court did not improperly instruct on a felony murder.

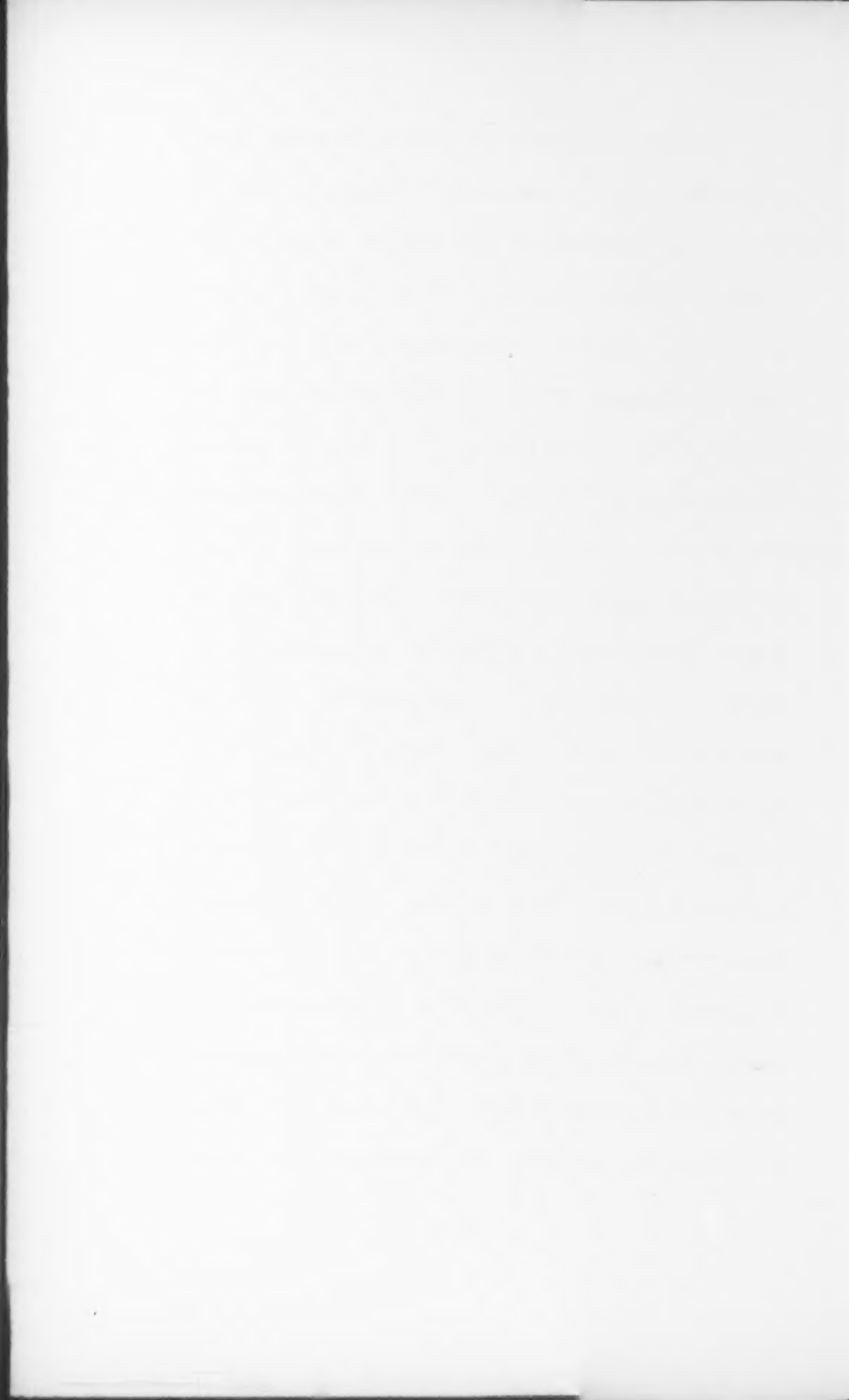
## II

### Rulings on the Testimony of Defense Witnesses

Martin complains he was denied his right to confrontation by the trial court's limitation of the cross-examination of Andrew Powell and James Murphy. He also argues the court abused its discretion when it failed to grant immunity to proposed defense witnesses. Finally, he challenges the trial court's ruling under Evidence Code section 352 admitting the statement of a former Assistant United States Attorney to the effect Martin could commit perjury.



Martin claims he should have been allowed to impeach Powell using specific instances in which Powell had lied in the past. The trial court properly ruled impeachment may not be based on past acts of misconduct nor on collateral matters. The court specifically found the examination would be too time consuming under Evidence Code section 352 and Martin could introduce evidence, as he did, to show Powell's reputation, thus achieving the same result properly. Testimony from Powell's girlfriend, his former commanding officer, a former employer and his former wife showed Powell had a reputation as a liar. Testimony of specific instances in which Powell made untruthful statements were unnecessary and could not be used to prove he acted in conformity with



this character trait in this trial. {Evid. Code, Section 1101, subd. {a}.} Prior specific acts may not be introduced as proof of a witness' character for honesty and veracity to support or attack the witness' credibility. {Evid. Code, Section 787; People v. Antick, 15 Cal.3d 79, 97; People v. Thompson, 98 Cal.App.3d 467, 475; People v. White, 18 Cal.App.3d 44, 48.} The admissibility of evidence is the duty of the trial court and we will not disturb the court's rulings absent clear error or an abuse of discretion. {People v. Alfaro, 61 Cal.App.3d 414, 423.} No such abuse or error is shown.





Deputy Marshal James Murphy testified Martin obtained Crake's address from Murphy and talked to Murphy the day after the murder. On cross-examination defense counsel attempted to show Martin had once asked Murphy to locate a litigant in one of Martin's lawsuits. The court ruled this testimony beyond the scope of direct examination and irrelevant unless the testimony related to Powell's contact with Crake. Martin asserts this testimony would explain Powell's presence at Crake's for a lawful purpose, i.e., to locate the other litigant. Admittedly the testimony was marginally relevant to contradict Powell's explanation for his visit. However, the cross-examination was of Murphy and this testimony would not elicit "any matter which may tend



to overcome, qualify or explain the testimony given by a witness on his direct examination.' {Italics added; [citations].}" {Gallagher v. Superior Court, 103 Cal.App.3d 666, 671} nor would it affect facts or denials necessarily implied from the testimony in chief or contradict any facts stated in direct examination. {Id., at p. 672; see also People v. Zerillo, 36 Cal.2d 222, 229; People v. Bigelow, 104 Cal.App.2d 380, 387, cert. den. 342 U.S. 910.}

Finally, the offer of proof shows the testimony was hearsay; the out-of-court statement -- Martin told Murphy he would send someone else to locate the litigant -- was offered to prove Powell was sent to locate the litigant. {Evid. Code, Section 1200, subd. {b}.} In any event, there is no



likelihood the jury's verdict would have have been more favorable if Murphy had testified to this conversation. {Evid. Code, Section 54; People v. Watson, 46 Cal.2d 818, 836.}

Martin claims the trial court abused its discretion by failing to grant immunity to three defense witnesses. Riley, Gross, and Wallace refused to testify under their Fifth Amendment privileges against self-incrimination. It is offered Riley would have corroborated testimony showing Martin did not supply the gun used by Powell. Gross would have testified Powell said Martin was not involved. Wallace would have testified Powell told him Martin was not involved and it was Powell's plan to extort money from Crake.

Penal Code section 1324 permits



immunity on the request of the district attorney. {Daly v. Superior Court, 19 Cal.3d 132, 146.} In People v. Sutter, 134 Cal.App.3d 806, the defendant argued the court has jurisdiction to grant judicial immunity in addition to that provided in the statute. Defendant Sutter and co-defendant Mayhew committed a robbery. Sutter drove the car; Mayhew entered and robbed a liquor store. Mayhew pled guilty while Sutter proceeded to trial. Sutter offered Mayhew's testimony would show Sutter did not know Mayhew was going to rob the store when he went in to buy beer because Sutter remained in the car. Mayhew asserted his Fifth Amendment privilege to shield evidence of a similar robbery in another prosecution. The People would not request immunity because the second robbery file was still open. The Court





of Appeal affirmed because the immunity issue had not been properly preserved on appeal. However, in response to a dissent the court went on to state the decision to grant immunity is discretionary. The decision rests first with the district attorney and in limited circumstances with the court. The Sutter dissenting judge also noted immunity is discretionary and must be clearly limited. An important factor is whether the defense witness is available to testify. In addition, the testimony must be clearly exculpatory, the testimony must be essential and there must be no strong contrary governmental interest. Here, although all three witnesses were available, their testimony is not clearly exculpatory in that it only contradicts Powell's assertion he received the gun from Martin and Martin coerced him into



performing the crime. This testimony was offered by another defense witness, Aguilar, and therefore the cumulative statements of three additional witnesses were not essential. Finally, the trial court expressly ruled immunity would not be proper due to the grave and serious circumstances of this crime.

In In re Marshall K. 14

Cal.App.3d 94, the court said:

"The cases hold that the state is under no obligation to make a witness available to testify for a defendant, or on behalf of the People for that matter, by granting him immunity from prosecution." {Id., at p. 99.}

Although there is federal and California precedent for limited judicially declared use immunity, no case has been cited which would permit



a trial court to require a witness to testify after his assertion of a Fifth Amendment privilege. In view of this scant authority and the Legislature's express delegation of the authority to grant immunity to the prosecution, there was no abuse of discretion in the trial court ruling.

Alternatively, Martin insists statements made by these witnesses to a policy investigator are admissible exceptions to the hearsay rule as declarations against penal interest under Evidence Code section 1230.

"Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far so subjected him to risk



of civil or criminal liability . . . a reasonable man in his position would not have made the statement unless he believed it to be true."

Here, although the witnesses' statements were clearly against their penal interest, it is not certain a reasonable person in their position would not have made the statement unless they were true. The trial court was faced with allegations Martin had bought and paid for this testimony and that these witnesses had nothing to lose by virtue of the fact they were currently incarcerated on other charges. The trial court's ruling to exclude this hearsay evidence was not an abuse of discretion.

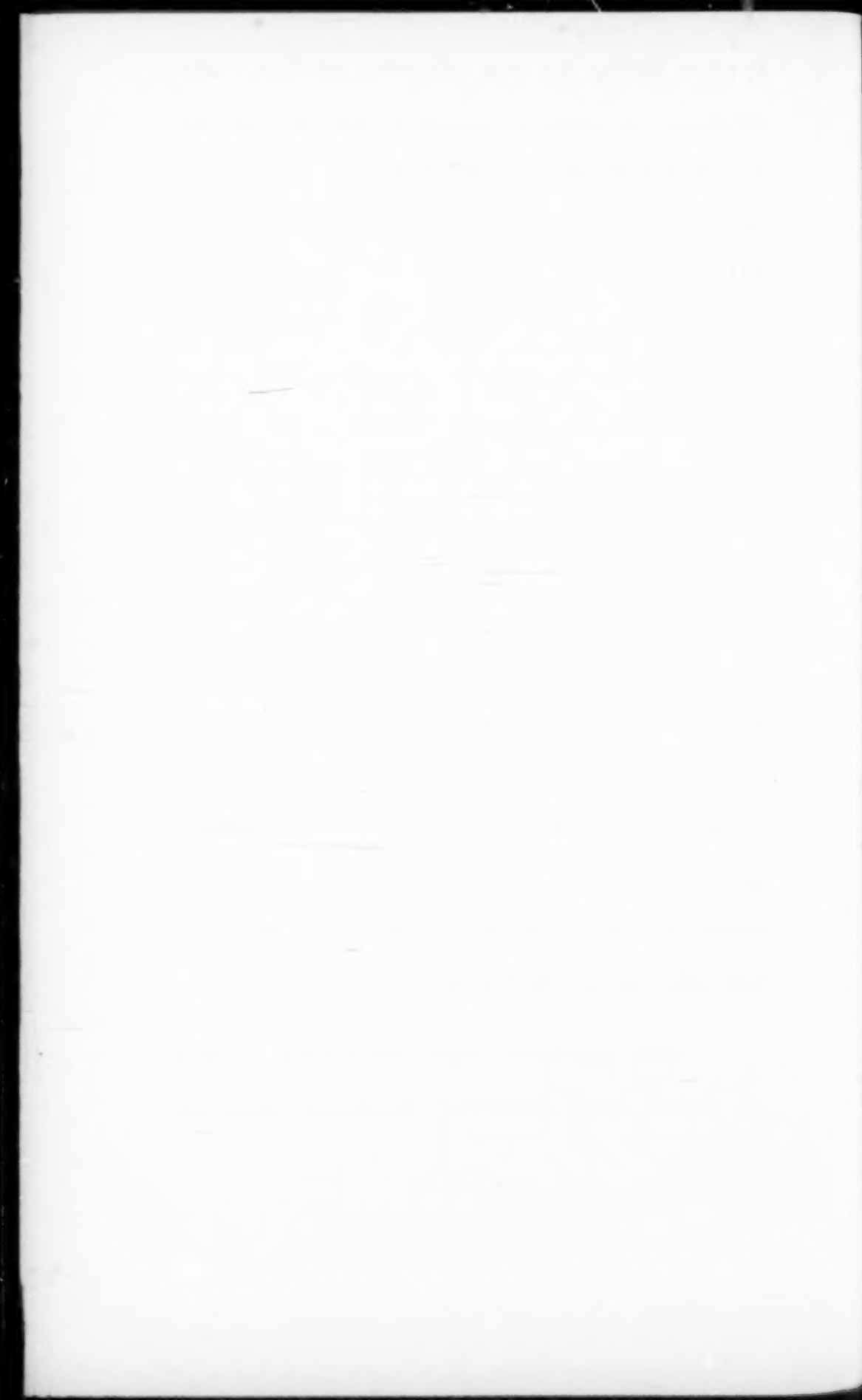
Martin next argues the trial court's ruling under Evidence Code section 352 admitting the testimony of former Assistant United States Attorney





Robert Knoll to the effect Martin was willing to commit perjury was an abuse of discretion. The statement showed Martin was willing to go to extraordinary lengths to assert his interests. The evidence tended to prove Martin's motive to take the law into his own hands based on his frustration with the civil litigation. Evidence Code section 352 requires a balancing of probative alone and prejudicial effect. The evidence did not show Martin had committed perjury at any time, Martin did not testify so there was no inference he currently was committing perjury and the statement only showed a possibility he was capable of criminal behavior. It was not unduly prejudicial.

Even without this evidence, there is other more powerful evidence showing



Martin's motive and plan to harm Crake. It is not reasonably probable a different result would have been reached if the trial court's ruling were error.

### III

#### Motion for Mistrial

During the trial a prosecution witness had an emotional outburst in which she told Martin he was guilty. The court questioned each juror individually to determine whether this unsolicited remark would effect their ability to unemotionally and independently evaluate the case. The court was satisfied each juror could ignore the remark and admonished the jury against using the remark for any purpose. Absent any evidence to the



contrary, we assume the jury was able to follow the trial court's admonition and disregard the statement. Juries often hear unsolicited and inadmissible comments and in order for trial to proceed without constant mistrial, it is axiomatic the prejudicial effect of these comments may be corrected by judicial admonishment; absent evidence to the contrary the error is deemed cured. {People v. Ryan, 116 Cal.App.3d 168, 184; People v. Seiterle, 59 Cal.2d 703, 710, cert.den. 375 U.S. 887; People v. Sandoval, 9 Cal.App.3d 885, 888.}

#### IV

Substantial Evidence

Supports the Verdict



Martin urges there is insufficient evidence to support each count. We review the elements of each conviction and recite the evidence supporting that element. A conspiracy is an agreement to commit an unlawful object and in furtherance of the agreement the commission of an overt act toward the achievement of that objective. {People v. Fujita, 43 Cal.App.3d 454, 471, cert. den. 421 U.S. 964.} The agreement may be shown by circumstantial evidence and the defendant's conduct carrying out their mutual purpose is sufficient. {People v. Lipinski, 65 Cal.App.3d 566, 575; People v. Hardeman, 244 Cal.App.2d 1, 41, cert. den. 387 U.S. 912.} Powell testified Martin solicited him to collect money and beat up Crake. Martin threatened Powell with jail and the loss of his job if he refused to





participate. Martin obtained Crake's current address and gave it to Powell. Powell then went to Crake's house, demanded the money, assaulted Crake and killed him. Powell's testimony is corroborated by the testimony of his girlfriend and Martin's other employees. This evidence is sufficient to support conviction for conspiracy to commit extortion and conspiracy to commit assault with a deadly weapon.

Martin attempts to argue the murder and assault were not in furtherance of the conspiracy because Powell had withdrawn from the conspiracy. This argument is directly contradicted by Powell's testimony of the conversation and his activities the night of the murder. Even though at times Powell refused to comply with Martin's instructions there is no



question but that Powell went to Crake's house the night of the murder, demanded the money, assaulted Crake and killed him. Even if Powell was reluctant at various times during the course of the planning stages of the crime, it is apparent he participated exactly as agreed, he so testified, and his testimony is corroborated by circumstantial evidence of other witnesses and the record of telephone calls between Powell and Martin the day and night of the murder.

A coconspirator is guilty of any crime committed by his confederate which is a natural or probable act committed in furtherance of the conspiracy or any crime which is one of natural and probable consequence of the object of the conspiracy. {People v. Brawley, 1 Cal.3d 277.} The question of

THE HISTORY OF THE  
CITY OF BOSTON  
FROM THE FIRST SETTLEMENT  
TO THE PRESENT TIME  
BY  
JOHN HUTCHINGS  
OF THE BOSTON BAR  
IN TWO VOLUMES  
VOL. II.  
BOSTON: PUBLISHED BY  
J. B. ALLEN, 1825.  
NEW-YORK: J. B. ALLEN, 1825.

what constitutes a natural and probable consequence is one of fact for the jury. {People v. Drolet, 30 Cal.App.3d 207, 217.} A reasonable jury could find the assault and murder were a natural and probable consequence of Martin's instructions to collect the money and beat up Crake, his giving Powell Crake's address and his providing a gun. Substantial evidence supports this jury's conclusions.<sup>4</sup>

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4. As a corollary to his challenges on the substantiality of the evidence, Martin claims the trial court should have dismissed the information under Penal Code section 995. Martin admits Powell's testimony at the preliminary examination so far as it related to Powell's contacts and relationship with Martin paralleled his testimony at trial. The trial court's ruling on a 995 motion requires a much lesser showing than that necessary for conviction. The determination is based on whether there is probable cause. Probable cause is established if a reasonable person would be led to believe and conscientiously entertain strong suspicion of the accused's guilt. {Somers v. Superior Court, 32



Cal.App.3d 961.) The trial judge is required only to weigh the evidence as a reasonable person for an inference, not for an absolute conviction, and if there is some evidence to support the information, the court does not examine its sufficiency. {People v. Velasquez, 53 Cal.App.3d 547.} All legitimate inferences are drawn in favor of the information. {People v. Markin, 34 Cal.App.3d 58.} Since we have found there is sufficient evidence to support a conviction beyond a reasonable doubt and a dismissal under section 995 only requires a showing of probable cause, it follows the 995 motion was properly denied.

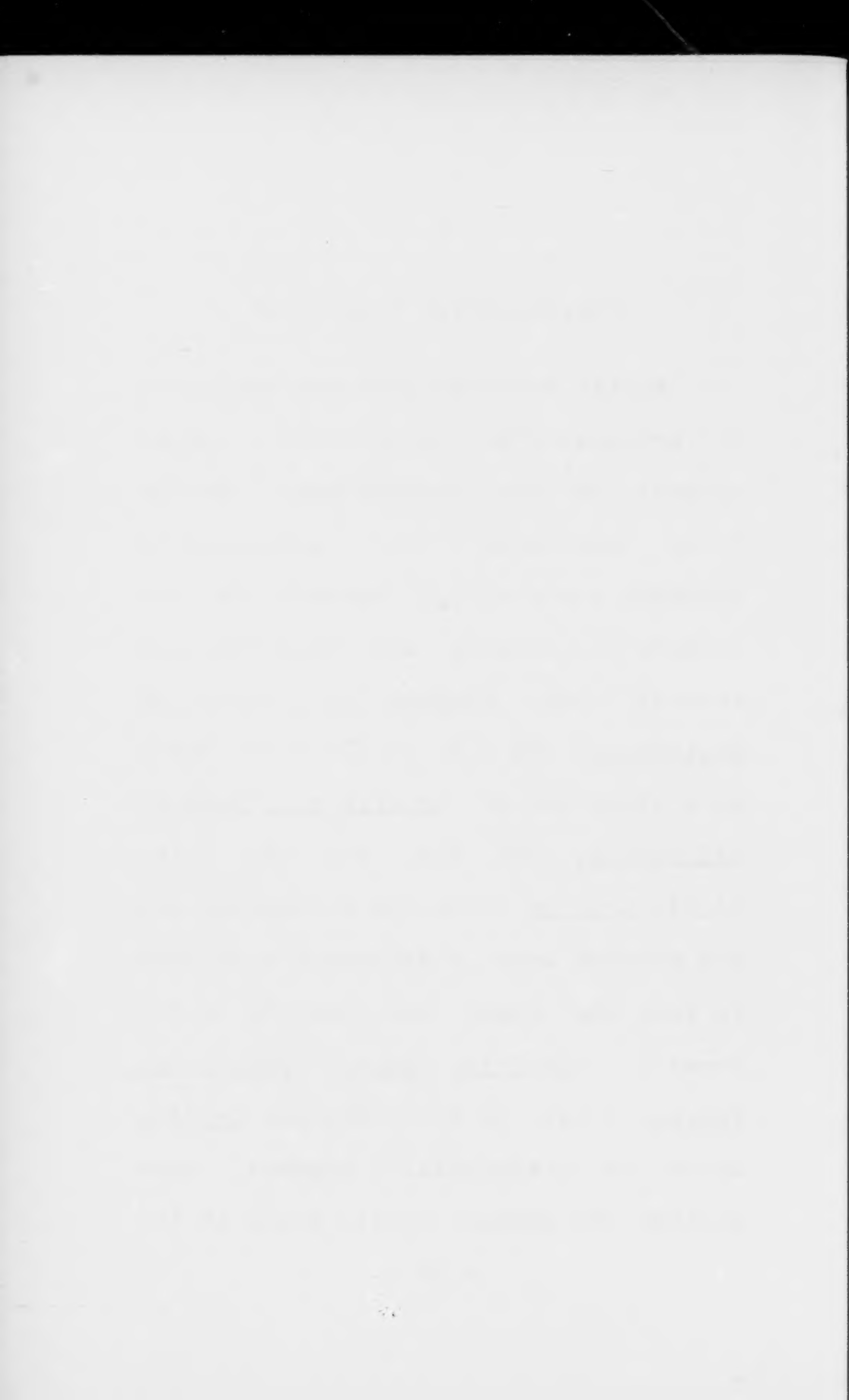
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V

Prosecutorial Misconduct

Martin declares numerous incidents of prosecutorial misconduct compel reversal of the convictions. Martin first complains the prosecutor's argument was a direct comment on his failure to testify and thus requires reversal under Chapman v. State of California, 386 U.S. 18 [87 S.Ct. 824], as a violation of Griffin v. State of California, 380 U.S. 609 [85 S.Ct. 1129]. Griffin holds the prosecutor may not comment upon a defendant's failure to take the stand and testify in his behalf. (Griffin, supra, People v. Vargas, 9 Cal. 3d 470.) Whether Griffin error is prejudicial depends upon whether the comment fills a gap in the



prosecution's case or touches a live nerve in the defense. {People v. Medina, 41 Cal.App.3d 438, 462; People v. Morse, 70 Cal.2d 711, 730, cert. den. 397 U.S. 944.}

In this case the prosecution merely stated the obvious; he simply noted the difficulty proving a conspiracy is that it must often be proved by circumstantial evidence because the conspirators frequently do not testify.<sup>5</sup>

5. The text of the comment is: "Let me read an instruction. 'It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an express or formal agreement. The formation and existence of a conspiracy may be inferred from all the circumstances tending to show the common intent, and may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence or by both direct and circumstantial evidence.' Let me suggest that conspiracy, prosecution cases

THE UNIVERSITY OF CHICAGO  
DIVISION OF THE PHYSICAL SCIENCES  
DEPARTMENT OF CHEMISTRY  
530 SOUTH EAST ASIAN AVENUE  
CHICAGO, ILLINOIS 60607

MEMORANDUM FOR THE RECORD  
SUBJECT: [Illegible]  
DATE: [Illegible]  
BY: [Illegible]  
TO: [Illegible]

[Illegible text block containing several paragraphs of text, likely a report or memorandum.]

often-times include both conspirators as defendants and none of the conspirators testify. Let me suggest to you that you consider this case in that light for a while. Consider your job as finding whether or not Andrew Powell and Herman G. Martin are guilty of Count I, conspiracy to commit extortion and County II and County III and Count IV, both of them are sitting over here on trial. Neither one of them testified. No testimony from either of the coconspirators. You hear the evidence that you heard in this case without Andrew Powell's testimony? Would you find him guilty?"

At this point defense counsel asked for a bench conference wherein the prosecutor explained he was attempting to argue even without Powell's testimony sufficient circumstantial evidence could be found to show the conspiracy. The court denied motion for mistrial.

After the first trial, the jury returned a verdict of guilty. The judge then sentenced the defendant to a term of imprisonment. The case was then closed.

The defendant was then taken to the prison. The judge then returned to the courtroom. The case was then closed.

It is hard to see the argument focused attention on Martin's failure to testify by asserting that even without Powell's testimony, sufficient evidence supported a finding of conspiracy. The trial court's instructions telling the jury Martin's failure to testify could not be used to infer his guilt would have cured any potential harm from this limited comment.

The record shows several references and innuendos by the district attorney to Martin's alleged connection with the Mafia. Martin directs our attention to three instances. The first instance occurred during examination of Deputy District Attorney Charles Hayes:

"Q: Did that deal with things in





his background?

"A: That's right.

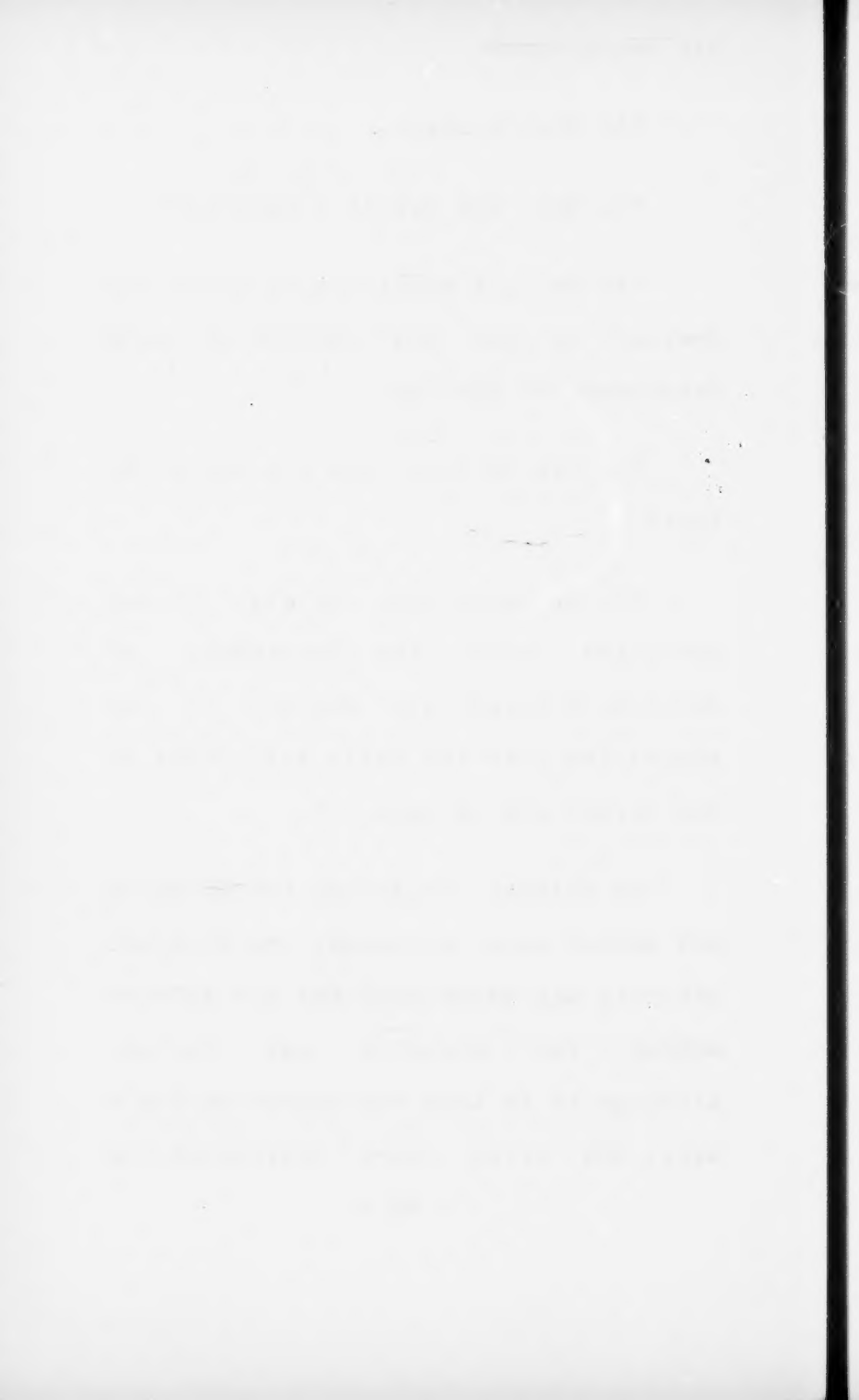
"Q: What was Martin's response?

"A: Well, I specifically asked him whether he had any connection with Department of Justice.

"Q: Did he tell you the answer to that?

"A: He said, yes, he did. He was connected with the Department of Justice. I asked him whether he was acquainted with the Mafia activities in New Jersey and he said --"

On defense objection the question and answer were stricken, the district attorney was admonished and the defense motion for mistrial was denied. Although it is true one cannot unring a bell, the trial court instructed the



jury they were not to consider answers which had been stricken from the record. We assume the jury understood and applied this instruction.

During closing argument the district attorney attempted to discredit defense testimony by an illustration "inspired" by the cover of the book The Godfather:

"Okay. Well, I want to talk about the credibility of some witnesses for a little while, and I am reminded of a popular book that came out a few years ago, and it was also a successful movie; a book called 'The Godfather'. I am reminded of that book, at least, the cover, the cover of that book. I don't know if any of you read it, but the cover of that book has the name on it, and I can't remember exactly what it is. It is either a hand or some figure, and there is strings going down to the words and the name, I think, like a puppet; like a person pulling the strings on a puppet. A vision of the

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cover of that book came to my mind when some defense witnesses testified in this case.

"For example, Marcia Sharpe. She is the daughter of the defendant. Okay. She got on the stand as a defense witness, and the defense pulled a string for April 6. Her testimony was, April 6 my father was on a couch about 9:30 in his office and had to be taken to the doctor. That is the response the April 6 string got.

"Okay. I cross-examined her, tried to cross-examine her about that. I pulled an April 7th string, or April 6th string. 'Who else was there?' 'I don't remember' 'Was Powell around?' 'I don't remember.' 'When did your father come back to work?' 'I don't remember.' This is just because the wrong person was pulling the strings."

Even though this illustration was unnecessary and may have been offered in bad faith, it does not amount to a dishonest act or an intent to persuade

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the jury by deceptive, reprehensible means. {People v. Strickland, 11 Cal.3d 946, 955.} Furthermore, in order to preserve this argument on appeal an objection must be made when the comment is made in order to give the trial judge an opportunity to cure any harm caused by the comment. {People v. Green, 27 Cal.3d 1, 27, 34.} No such objection was made here and an admonishment could have cured any potential prejudicial effect of the illustration.

Martin last complains of the prosecution's analogy of Powell's testimony to the testimony of Jimmy Fratianno:

"So, you know it is not hard in a case like this, in any conspiracy case, to run down the credibility of, or the character of, one of the coconspirators. People who





conspire together to commit crimes are not decent, good, law-abiding, upstanding people. When one of them gets on the stand and testifies, it is easy to run down their credibility.

"Let me give you an example of a guy who has been in the press recently. Jimmy Fratianno. The guy has been a crook all his life. He has been a hit man. Okay? He has testified. [At this point in response to defense objection a bench conference was held and the prosecutor instructed to forego this illustration.]

This incomplete analogy was abandoned after a bench conference and this limited comment could not in any way have affected the verdict following this month-long trial.

Martin asserts prosecutorial misconduct because the prosecutor wilfully suppressed material evidence. This assertion is based on Martin's assumption the three defense witnesses



who asserted their Fifth Amendment privileges did so because another defense witness was arrested. In People v. Ruthford, 14 Cal.3d 399, 406, the court stated:

"[W]hen the evidence which is suppressed or otherwise made unavailable to the defense by conduct attributable to the state bears directly on the question of guilt our initial inquiry is whether such conduct resulted in denial of a fair trial."

In this case there is no offer of proof nor evidence the witnesses' decision to not testify was based on any conduct attributable to the state. In fact when the court was advised of the defense witnesses' arrest, the court stated the arrest had "nothing to do with this Court" although tactically it might have been "best left undone." Without conduct attributable to the

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prosecution there cannot be any wilfull suppression of evidence.

Martin raises a few more insignificant complaints. First, during closing argument the prosecutor remarked "those black guys upstairs in the jail didn't come in and testify that Powell tried to get a gun from them. His efforts in this regard, apparently, were not fruitful." The defense objection to this comment was sustained. Martin complains the prosecutor misstated the law on conspiracy. It is the duty of the trial court, not the prosecutor, to instruct the jury on the law and the court instructed the jury correctly. The prosecution, defense and the court all told the jury that they would receive legal instruction from the court. The prosecutor's comment had no

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effect on these instructions. Finally, Martin argues the prosecutor questioned a witness on privileged information. The defense objections were sustained and the jury was instructed questions are not evidence. No harm accrued from these questions.

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## VI

### Petition for Writ

### of Habeas Corpus

Martin's motion to consolidate his petition for writ of habeas corpus with the related appeal is granted. The petition presents four arguments: prosecutorial misconduct, deprivation of a fair trial based on witness intimidation, the prosecutor failed to disclose inducements had been offered to key prosecution witnesses in exchange for their testimony and newly discovered credible evidence undermines the entire case. The allegations in the petition for writ of habeas corpus concerning prosecutorial misconduct and witness intimidation have been



dispensed with on the merits in the opinion on appeal. {See part V, above.} A potential witness' assertion of the Fifth Amendment privilege against self-incrimination is not conduct attributable to the prosecutor.

Martin next argues the prosecutor's failure to disclose inducements made to key prosecution witnesses in exchange for their testimony deprived him of a fair trial. This allegation concerns the testimony of Powell and Steven Jarrett. Martin offers exhibits to show the district attorney offered to intercede on Powell's behalf to allow him to obtain more favorable treatment in the Department of Corrections. Similarly he offers exhibits to show Jarrett was promised more favorable treatment at



judgment and sentencing in another case. Martin concedes such inducements are common prosecutorial tools and that these particular promises were not necessarily improper. His argument, however, is based on the failure to disclose the fact inducements were made. {People v. Ruthford, supra, 14 Cal.3d 399, 406, 408; In re Ferguson, 5 Cal.3d 525, 531.}

A prosecutor must disclose substantial material evidence favorable to the accused even without a request. {People v. Ruthford, supra, 14 Cal.3d at p. 406; In re Ferguson, supra, 5 Cal.3d at p. 533; Brady v. State of Maryland, 373 U.S. 83, 87 [83 S.Ct. 1194]; Napue v. People of the State of Illinois, 360 U.S. 264, 269 [79 S.Ct. 1173].} Where the undisclosed evidence is that of any inducement for



testimony, both the failure to disclose this interest to the jury or to the defense and the failure to correct a misleading statement that no inducement was offered denies the defendant a fair trial where "the evidence thus suppressed by the prosecution related to the credibility of a key witness whose testimony may have been determinative of guilt or innocence." {People v. Ruthford, supra, 14 Cal.3d at p. 406; citing Giglio v. United States, supra, 405 U.S. at p. 154.}

Although Jarrett's testimony was important, Powell's testimony as the coconspirator was pivotal. Both witnesses denied promises of lenient treatment had been made to them in exchange for their testimony. The district attorney sat by as the misleading testimony entered the record





and in the case of Powell argued: "There is no evidence that he was given any kind of deal for his testimony." {See People v. Varona, 143 Cal.App.3d 566, 570.} Aside from the exhibits accompanying the petition for habeas corpus, it appears in the record this conduct was more than an oversight and beyond benign neglect.

"The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial, and it is the solemn duty of the trial judge to see that the facts material to the charge are fairly presented. [Citations.] In the light of the great resources at the command of the district attorney and our commitment that justice be done to the individual, restraints are placed on him to assure that the power committed to his care is used to further the administration of justice in



our courts and not to subvert their procedures in criminal trials designed to ascertain the truth.

"... Although our system of administering criminal justice is adversary in nature, a trial is not a game...." {In re Ferguson, supra, 5 Cal.3d 525, 531.}

In the case the prosecutor had a duty to disclose to the court the misleading testimony of the prosecution witnesses. The prosecution's failure resulted in the suppression of substantial material evidence concerning the credibility of chief witnesses. Nonetheless we must evaluate whether this affected the outcome of the trial. We are satisfied that had the jury known the witnesses had been promised more lenient treatment in exchange for their cooperation, it would not have affected the verdict. Both witnesses faced

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severe penal sanctions and the district attorney's offer to intercede would only have changed the character of the sanctions. Both witnesses had other motives to testify. Both witnesses' testimony was corroborated by other direct testimony and circumstantial evidence.

Martin's final argument is new evidence has become available which undermines the entire case of the prosecution and could not have been discovered by diligent pretrial investigation. {In re Hall, 30 Cal.3d 408, 417.} The proposed testimony is that of Wallace Jackson. Jackson was Powell's cellmate in county jail before trial. Martin asserts Jackson would testify Powell and Wallace concocted a scheme to frame him. None of the information supplied by Jackson's



declaration constitutes evidence undiscoverable before trial. Both Jackson's and Wallace's declarations state they were cellmates along with Richard Tiebout and Powell during the defense investigation. The defense investigator interviewed Wallace and Tiebout and could just have easily interviewed Jackson. No new evidence which would have undermined the prosecutor's case is presented and the potential witness was discoverable before trial.

## VII

### Disposition

The judgment on appeal is affirmed. The petition for writ of habeas corpus is denied. The defendant's motion for bail on appeal





is denied.

STANIFORTH, J.

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STANIFORTH, J.

I CONCUR:

COLOGNE

---

COLOGNE, ACTING P.J.

STATE OF NEW YORK

IN SENATE

JANUARY 1, 1920

REPORT

OF THE

C

Wiener, J., concurring and dissenting.

I concur with the majority in affirming Martin's convictions of conspiracy to commit extortion, conspiracy to commit assault with a deadly weapon and simple assault. However, I believe instructional error requires reversal of Martin's conviction of second degree murder. Martin was neither charged with nor tried for conspiracy to commit murder, reflecting the district attorney's assessment before trial that there was insufficient evidence to establish an agreement between Martin and Powell that Powell was to murder Crake. The deputy district attorney who tried the case did so consistently, but incorrectly, with these pleadings on the theory that the unintended killing



was the objectively foreseeable result of the charged conspiracies, neither of which can legally support a finding of second degree murder.

Jury instructions may not be considered in the abstract. They must be evaluated in the context of the actual trial, considering the theories advanced and the evidence presented. In the case before us the jury was directed to limit its consideration of Martin's guilt on the murder count to "the conspiracy theory if at all." {See slip opn., p. 7, italics supplied.} In effect, the jury was told to disregard the instructions on aiding and abetting. My assessment of the record is shared by the Attorney General who asserts: "The plain language of the above instruction indicates the jury was not to consider



an aiding and abetting theory when they evaluated the murder count." "[They were told to] evaluate the murder count using a conspiracy theory exclusively." {Italics supplied.}

Excising the aiding and abetting instructions, it appears the jury convicted Martin on the following instructions. The jury first determined Martin was guilty of the conspiracies to commit assault with a deadly weapon. As a coconspirator, the jury was then told Martin had the same culpability as Powell: "Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if said act or said declaration is in furtherance of the object of the conspiracy. [ ] The act of one conspirator pursuant to or in





furtherance of the common design of the conspiracy is the act of all conspirators. Every conspirator is legally responsible for the act of a coconspirator that follows as one of the probable and natural consequences of the object of the conspiracy even though it was not intended as a part of the original plan and even though he was not present at the time of the commission of such act." {CALJIC No. 6.11.} Finally, in determining whether second degree murder was a "probable and natural consequence of the object of the conspiracy," the jury was permitted to apply part of CALJIC No. 8.30 and all of CALJIC No. 8.31 {1981 rev.}: "Murder of the second degree is [also] the unlawful killing of a human being with malice aforethought when there is manifested an intention unlawfully to kill a human being . . .



.[1]

1. The court omitted the concluding phrase of CALJIC No. 8.30, as follows: "...but the evidence is insufficient to establish deliberation and premeditation."

The course entitled "The  
 Economic History of California"  
 at the University of California  
 is a course in the history of  
 the state, and is a course in  
 the history of the state.

[ ] Murder of the second degree is [also] the unlawful killing of a human being as the direct causal result of an intentional act involving a high degree of probability that it will result in death, which act is done for a base, antisocial purpose and with wanton disregard for human life. [ ] When the killing is the direct result of such an intentional act, it is not necessary to establish that the defendant intended that his act would result in the death of a human being."

None of these instructions informed the jury they were to focus on Martin's state of mind in determining whether he harbored the malice necessary for conviction of second degree murder. To complicate matters further, the case was tried and argued in a manner which allowed the jury to

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being as the first degree is of an  
animal and human being. It is  
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an animal killing. It is not  
human killing but the human killing  
of a human being.

There is a third distinction  
between the first and second degree  
killing of a human being. It is  
whether the killing is intentional  
or unintentional. It is necessary  
to determine the degree of killing  
in a case which involves the jury in  
a case which involves the jury in

substitute Powell's state of mind for that of Martin's in finding Martin guilty of second degree murder.

The deputy district attorney argued that if the jury decided Powell acted for a base, antisocial purpose and with wanton disregard for human life, then Martin was guilty as a coconspirator since murder was a natural and probable consequence of the conspiracy. After saying he wanted to talk about "homicide law," the prosecutor argued:

"With respect to Count III [murder], this jury must decide the case of the People of the State of California versus Andrew Powell. You have to decide without regard to Herman Martin or any -- just take him out of the picture for a minute. You have seen the evidence about Andrew Powell killing Richard Crake. You have to decide what kind of a killing that was, because the only thing





that is important with respect to this conspiracy theory is, Andrew Powell, his state of mind and what kind of a homicide did he commit when he killed Crake.

".....

"First of all, the only instructions you are going to hear, the only choices you are going to get are between second degree murder and voluntary manslaughter or not guilty. The evidence is going to show this is a second degree murder. Homicide is the unlawful killing of someone....

"Well, the first two of those you don't have any problem with. Mr. Crake was killed, and it was clearly an unlawful killing. The question is, did Andrew Powell have a state of mind that we described as malice aforethought? Because the difference between murder and manslaughter is the presence or absence of malice aforethought. If it is an unlawful killing and there is malice aforethought, it is murder. If there is no malice aforethought, it is

that is, in the  
course of the  
investigation, it was  
found that the  
subject had been  
in contact with  
a person who was  
known to the  
author.

It was also found  
that the subject  
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manslaughter. That is it simply."

The deputy district attorney proceeded to focus on Powell's state of mind, arguing:

"You tell us what he [Andrew Powell] intended to do. Don't let Andrew Powell tell you what his state of mind was. You tell him . . . . The jury can tell Herman Martin what Andrew Powell's state of mind was.

"I suggest to you Andrew Powell was full of malice, and the killing that resulted in this case clearly shows that. This is a second degree murder. Murder of a second degree is the unlawful killing of a human being with malice aforethought when there is manifested an intention to unlawfully kill a human being. That is called unpremeditated murder of the second degree. You will get that instruction.

".....

Washington, D.C. 20540  
The President  
The White House

The report of the  
President's Commission  
on the Assassination of  
President John F. Kennedy

Volume 1  
The Assassination of  
President John F. Kennedy  
October 22, 1963  
Dallas, Texas  
The Warren Commission  
The President's Commission  
on the Assassination of  
President John F. Kennedy

Volume 2  
The Assassination of  
President John F. Kennedy  
October 22, 1963  
Dallas, Texas  
The Warren Commission  
The President's Commission  
on the Assassination of  
President John F. Kennedy

"Was there manifested an intention on Powell's part to kill Mr. Crake? Clearly, there was. I mean, he beat him. He shot him. That manifested an intent to kill. Powell did second degree murder."

The court's instructions to the jury, consistent with the prosecutor's argument, failed to inform the jury that in order to convict Martin of second degree murder it was Martin who had to act with either express or implied malice.

The court's error in permitting Powell's malice to be attributed to Martin was exacerbated by the court's error in partially instructing on felony-murder. The court inexplicably gave part of CALJIC No. 8.51. The giving of that instruction seems "inexplicable" because the court rejected CALJIC Nos. 8.32 and 8.33.

THE STATE OF TEXAS,  
COUNTY OF DALLAS.  
I, the undersigned, a Justice of the Peace for and in and for the County of Dallas, State of Texas, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the County of Dallas, State of Texas, this 1st day of May, 1901.

THE STATE OF TEXAS,  
COUNTY OF DALLAS.  
I, the undersigned, a Justice of the Peace for and in and for the County of Dallas, State of Texas, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the County of Dallas, State of Texas, this 1st day of May, 1901.

THE STATE OF TEXAS,  
COUNTY OF DALLAS.  
I, the undersigned, a Justice of the Peace for and in and for the County of Dallas, State of Texas, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the County of Dallas, State of Texas, this 1st day of May, 1901.

Those instructions present the basic second degree felony-murder rule and further provide that if a killing is done to further the common purpose of a conspiracy to commit a felony inherently dangerous to human life, all of the coconspirators are deemed to be equally guilty of murder of the second degree whether the killing is intentional, unintentional or accidental. The court's rejection of those instructions and the fact the prosecutor was prevented from arguing a felony-murder theory suggests the giving of part of CALJIC No. 8.51 was due to an oversight. Nonetheless, the jury was instructed: "If a person while committing a felony inherently dangerous to human life causes another's death, malice is implied, and the crime is murder. If while committing a misdemeanor inherently





dangerous to human life he causes another's death, there is no malice, and he is guilty of manslaughter." 2

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2. Although this instruction is included in the packet of requested instructions submitted by Martin's counsel, the record does not indicate whether it was actually requested and rejected. Unlike other requested instructions upon which "rejected" is written, only a question mark appears on this instruction. Whether the question mark means the defense lawyer and/or the court had concern with the instruction or were undecided whether to request or reject the instruction is not clear from the record. Accordingly, the doctrine of invited error is inapplicable.

Department of State, 1111 14th Street  
Washington, D.C. 20520  
May 15, 1961

1. Although this investigation is  
conducted in the name of the  
Department of State, it is not  
an official act of the  
Department. It is a private  
investigation conducted by  
the Department of State.  
The Department of State is  
not responsible for the  
results of this investigation.  
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not responsible for the  
results of this investigation.

{Italics supplied.} The instruction was not supplemented, nor could it have been, by instructions defining the underlying dangerous felony or misdemeanor. Pursuant to the rationale of People v. Ireland {1969} 70 Cal.2d 522, 538-540, the felony of assault with a deadly weapon cannot be used to support a second degree murder conviction on a felony-murder theory. Extortion also is unavailable as the underlying felony because it is not inherently dangerous to human life. 3

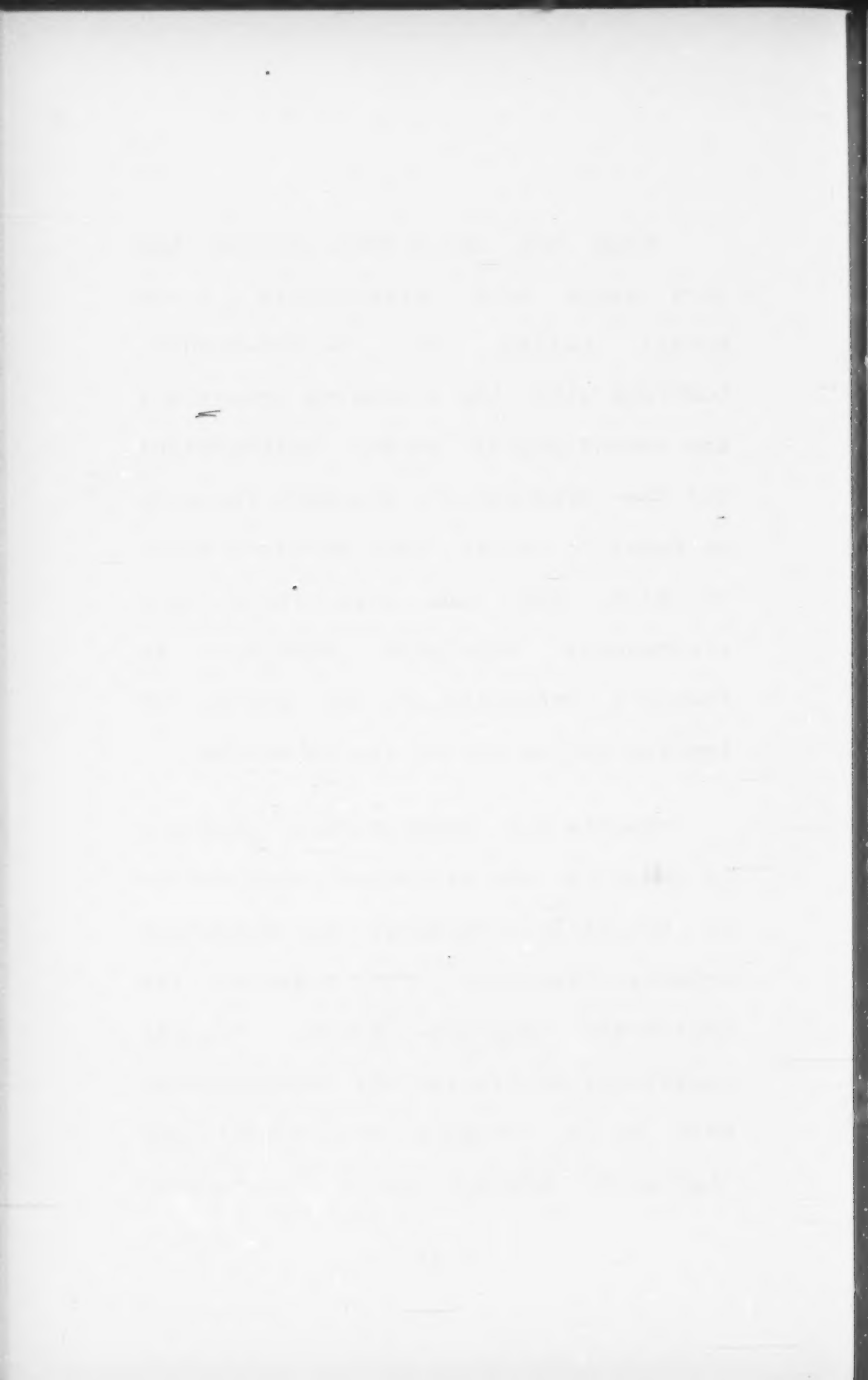
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3. In determining whether a felony is inherently dangerous to human life the elements of the felony must be considered in the abstract, not the particular facts of the case. {People v. Henderson {1977} 19 Cal.3d 86, 93.} Clearly, obtaining property from another with his consent by wrongful use of force or fear {Pen. Code, Section 518} may be accomplished without inflicting mortal or life-threatening physical harm.



From the above instructions the jury could have erroneously found Powell guilty of felony-murder. Combined with the preceding conspiracy and second degree murder instructions and the prosecutor's argument focusing on Powell's rather than Martin's state of mind, the jury then could have erroneously concluded Martin, as Powell's coconspirator, was guilty of implied malice second degree murder.

Courts and commentators continue to question the mechanical application of artificial formulae to establish criminal liability. For example, the California Supreme Court "...has repeatedly criticized the felony-murder rule as a 'highly artificial' and 'barbaric' concept which '...erodes



the relation between criminal liability and moral culpability"....'" {People v. Dillon {1983} 34 Cal.3d 441, 494 [conc. opn. of Bird, C.J.].} Courts have historically equated the degree of criminal liability with the actor's state of mind. Mens rea has always been stressed to insure that punishment which society prescribes for a specific crime is directly related to the criminal purpose of the perpetrator. [See Pen. Code, section 20; 1 Witkin, Cal. Crimes {1964 and 1978 Supp.} Elements of Crime, Section 52.] Only recently, for example, this court held the objective standard of CALJIC No. 8.31 for implied malice second degree murder was inadequate because the instruction failed to require a finding the defendant acted with a subjective awareness that his conduct endangered the life of another. {People v. Smith

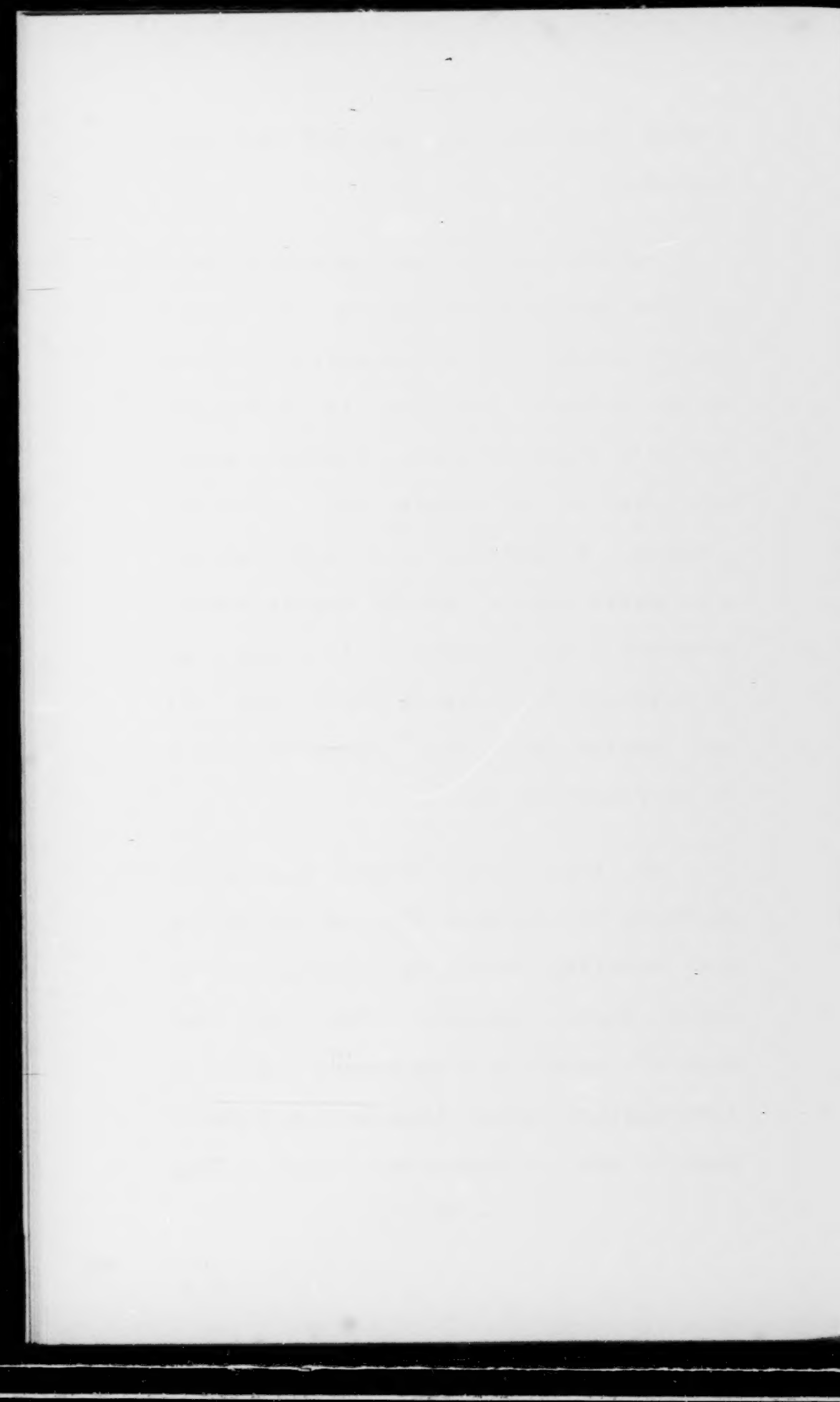




{1983} 148 Cal.App.3d 468 477-478,  
480-481.}

Paradoxically, the majority here affirms Martin's conviction of second degree murder on a conspiracy theory which allowed the jury to disregard Martin's state of mind. Instead, guilt was based on a simple but incorrect formula: conspiracy {of any felony} plus death equals second degree murder provided - the death {1} was an objectively foreseeable event and {2} was caused by the coconspirator's death-resulting act.

In this case, there was ample evidence to convict Martin of aiding and abetting Powell's commission of second degree murder. The fact that Martin used a mercenary as an intermediary rather than acting himself does not immunize him from



culpability. Accordingly, had the jury been asked to decide whether Martin, under all the circumstances, acted with implied malice 4

-----

4. The deputy district attorney in argument acknowledged Martin did not act with express malice. He said "Herman Martin probably didn't want Richard Crake killed, didn't intend that to happen at all."



in intentionally instigating a chain of events which directly resulted in Crake's death, it may well have answered affirmatively. Unfortunately, the jury was never given that opportunity. Accordingly, I conclude Martin's second degree murder conviction must be reversed. Regardless of Martin's apparent guilt of second degree murder, he is nonetheless entitled to a factual determination of each of the elements of that crime. {See People v. Kent {1981} 125 Cal.App.3d 207, 213, 214, fn. 7.}

CERTIFIED FOR PUBLICATION.

WIENER

---

WIENER, J.



APPENDIX "B"





COURT OF APPEAL,  
FOURTH APPELLATE DISTRICT  
DIVISION ONE  
STATE OF CALIFORNIA

COURT OF APPEAL - FOURTH DIST.  
FILED  
JAN 13 1984  
KEENAN G. CASADY, Clerk

---

Deputy Clerk

In re HERMAN G. MARTIN	)	
on Habeas Corpus.	)	4 Crim. No.
	)	15681
<hr/> THE PEOPLE,	)	
	)	(Super. Ct. No.
Plaintiff and Respondent,	)	CR 56081
	)	
v.	)	4 Crim. No.
	)	13945
HERMAN G. MARTIN,	)	
	)	(Super. Ct. No.
Defendant and Appellant.	)	56081)
<hr/>	)	

The petition for rehearing is denied.

COLOGNE

---

COLOGNE, ACTING P.J.

Copies to: All parties



APPENDIX "C"



CLERK'S OFFICE,  
SUPREME COURT  
4250 STATE BUILDING  
SAN FRANCISCO, CALIFORNIA 94102  
APR 19 1984

I have this day filed Order \_\_\_\_\_

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HEARING DENIED

Bird, C.J.

Kaus, J.

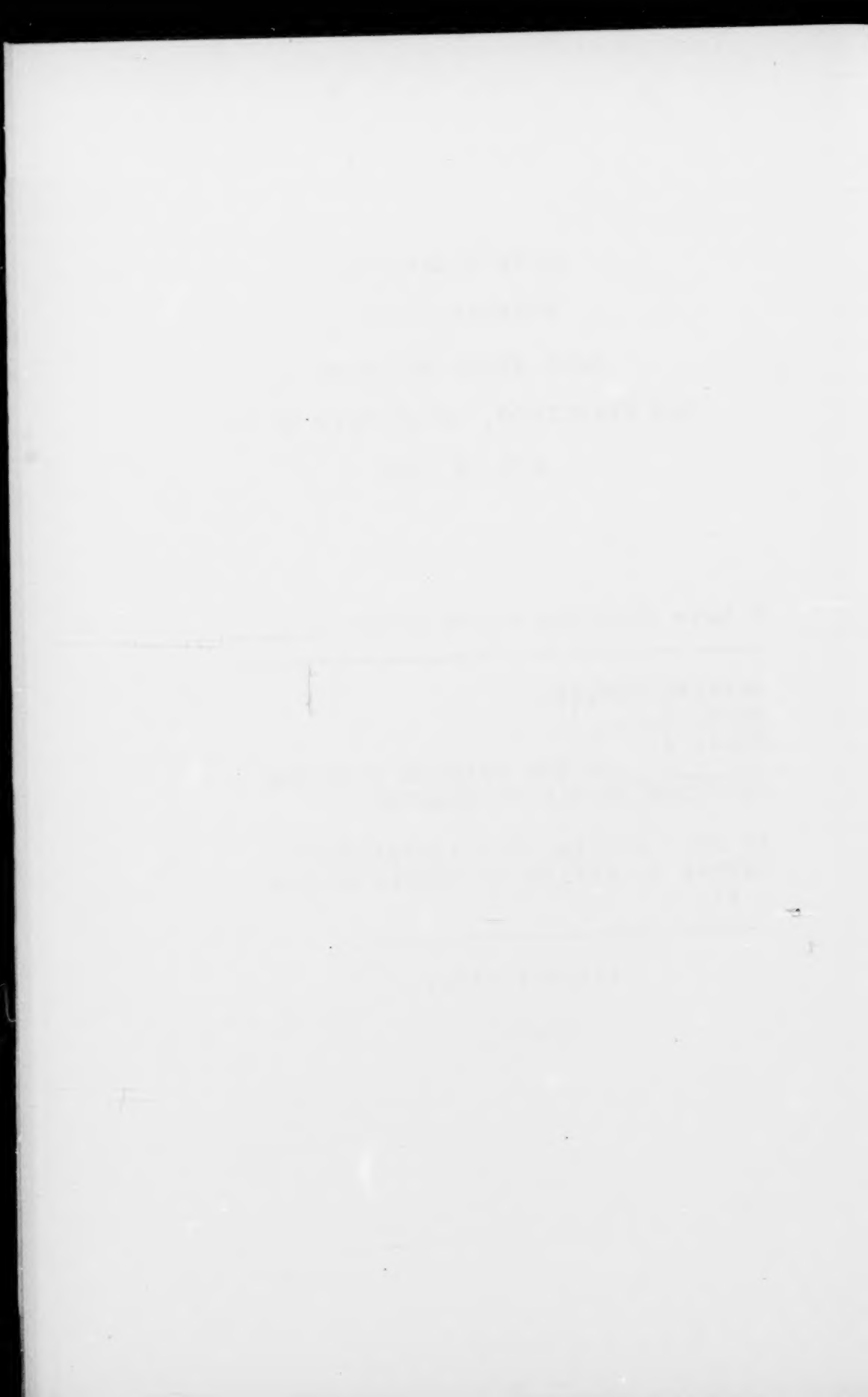
\_\_\_\_\_ OF THE OPINION THAT THE  
PETITION SHOULD BE GRANTED.

In re: 4 Crim. No. 13945/15681  
HERMAN G. MARTIN on habeas corpus  
vs.

---

Respectfully,

Clerk



## APPENDIX "D"





COURT OF APPEAL  
STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
Division One

PEOPLE V. MARTIN  
IN RE: MARTIN ON HABEAS CORPUS

4 Crim. 13945  
San Diego County No.  
CR 56081

REMITTITUR TO COUNTY CLERK

I, KEENAN G. CASADY, Clerk of the Court of Appeal, Fourth Appellate District, State of California, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on December 23, 1983 and this opinion or decision has now become final {California Rules of Court, rule 25}. The judgment on appeal is affirmed. The petition for writ of habeas corpus is denied. The defendant's motion for bail on appeal is denied.



Witness my hand and seal of  
the Court this 23rd day of April, 1984.  
Keenan G. Casady, Clerk

GALE ONDLER

By: \_\_\_\_\_  
Gale Ondler, Deputy Clerk

-----  
Copy of Remittitur ONLY to:  
Attorney General, 110 West "A" Street,  
Suite 600, San Diego, CA 92101  
Director, Department of Corrections,  
P.O. Box 714, Sacramento, CA 95814  
Office of the District Attorney,  
Appellate Division, Post Office  
Box X-1011, San Deigo, CA 92112

Gerald B. Glazer, Esq.  
1211 "H" St., Suite D  
Sacramento, CA 95814

3  
No. 83-2062

Office - Supreme Court, U.S.
FILED
OCT 4 1984
ALEXANDER L. STEVAS.
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1983

HERMAN G. MARTIN,  
  
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,  
  
Respondent.

ON PETITION FOR WRIT OF CERTIORARI  
TO THE CALIFORNIA SUPREME COURT

---

---

BRIEF OF RESPONDENT IN OPPOSITION

---

---

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**BEST AVAILABLE COPY**

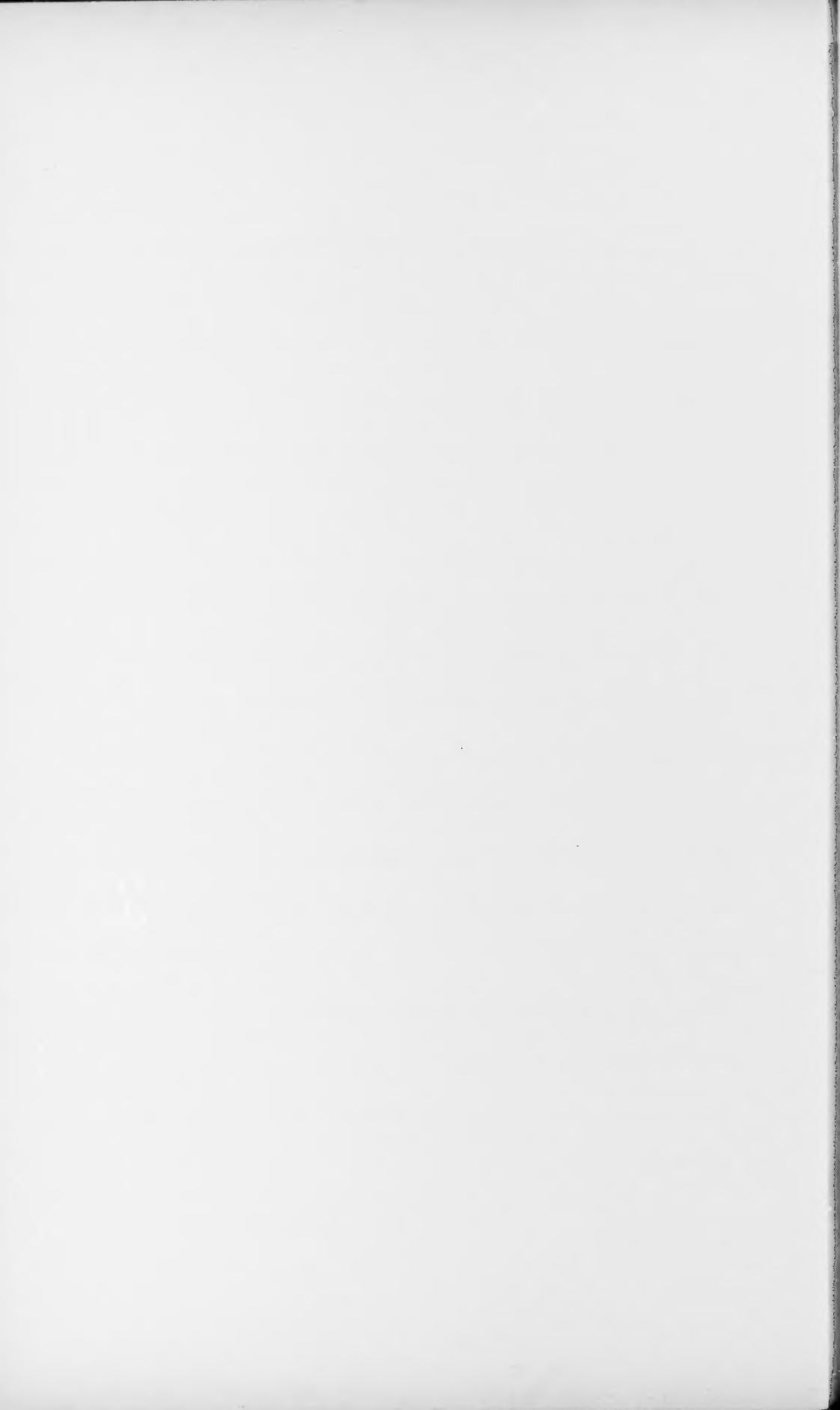
64 pp

QUESTIONS PRESENTED

1. Whether a prosecutor's comment on the state of the evidence in the case may constitute Griffin error simply because it tangentially refers to the defendant's silence?

2. Whether a trial court is obligated to grant immunity to defense witnesses simply because the defense claims the witnesses can offer some exculpatory evidence?

3. Whether a question by the prosecutor and some comments by the prosecutor during closing argument require the granting of review by certiorari when the question and comments had no fundamental effect on the trial and do not have any constitutional implications?



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No. 83-2062

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1983

---

HERMAN G. MARTIN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE CALIFORNIA SUPREME COURT

---

BRIEF OF RESPONDENT IN OPPOSITION

---

OPINION BELOW

The California Court of Appeal, Fourth Appellate District, Division One, received petitioner's direct appeal from a judgment of conviction as well as a petition for habeas corpus. In a published opinion, the court affirmed the convictions and denied petitioner's request for habeas relief.





(Petn., App. A; In re Martin (1984) 150 Cal.App.3d 148.)

### JURISDICTION

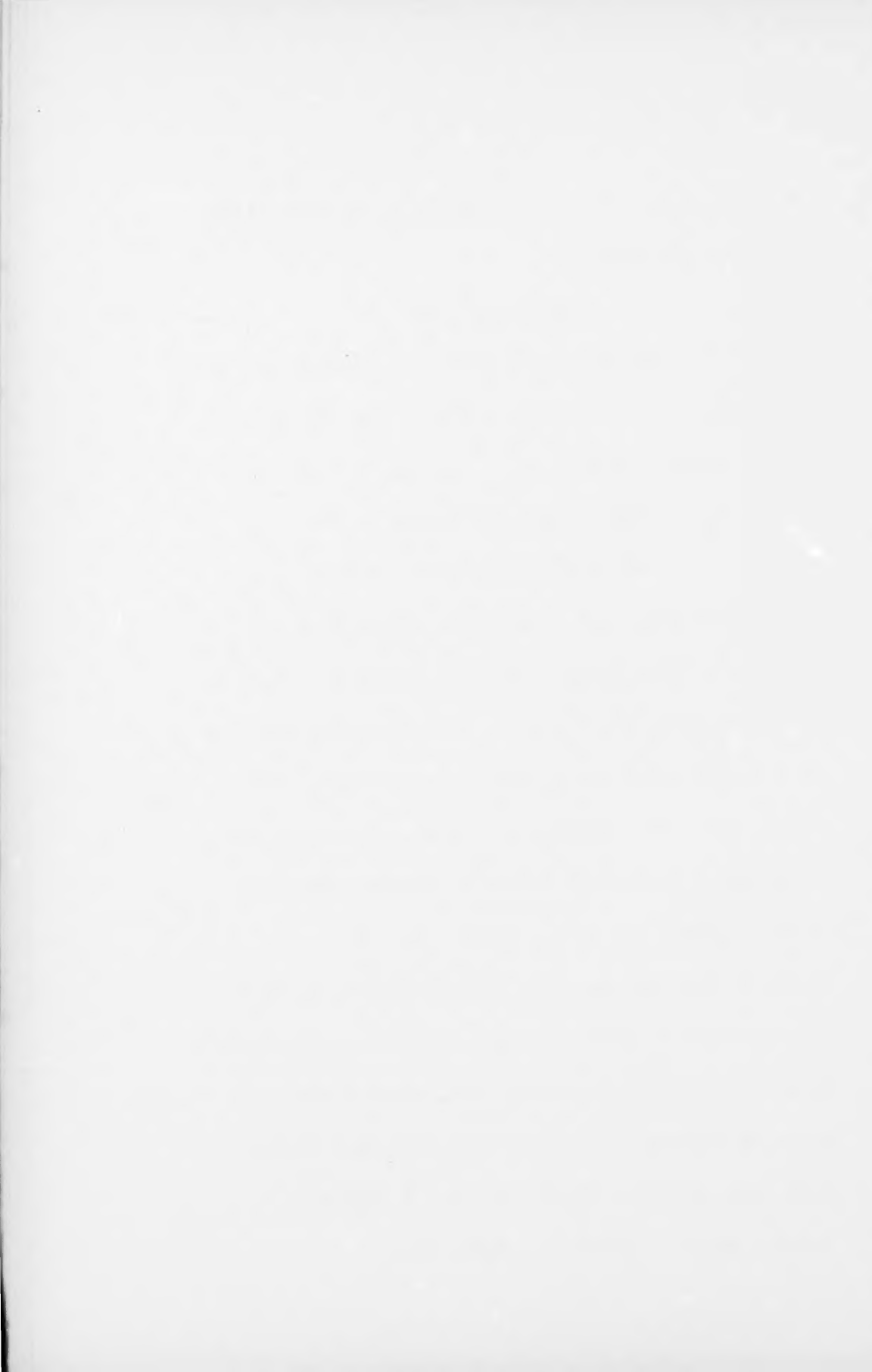
This Court has jurisdiction to consider this case pursuant to 28 U.S.C. 1257, subdivision 3.

### STATUTES INVOLVED

The applicable statutes involved are set forth in Appendix A.

### STATEMENT OF THE CASE

A jury found petitioner guilty of conspiracy to commit extortion (Pen. Code, §§ 182, subd. 1; 518), conspiracy to commit assault with a deadly weapon (Pen. Code, §§ 182, subd. 1; 245), second degree murder (Pen. Code, § 187) and assault (Pen. Code, § 240). The jury also found petitioner had been armed with a firearm during the conspiracies and the murder (Pen. Code, § 12022, subd. (a)). (Petn., App. A.)



Petitioner was sentenced to state prison for a term of 15 years to life for the murder and a one year enhancement was also imposed. Sentencing on the conspiracies was stayed. (Pen. Code, § 654.) Petitioner was given a concurrent six month sentence on the assault with a deadly weapon charge. (Petrn., App. A.)

In a published opinion, the California Court of Appeal, Fourth Appellate District, Division One affirmed the convictions and denied petitioner's request for habeas corpus relief. (In re Martin, supra, 150 Cal.App.3d 148; Petn., App. A.)

The California Supreme Court declined to consider petitioner's case on appeal or on habeas corpus. (Petrn., App. C.)



Petitioner has petitioned this Court for a writ of certiorari in this case based on the appeal (83-2062) and in the case arising out of the habeas corpus petition (83-2057). A response has already been filed in 83-2057.

STATEMENT OF FACTS

The facts are adequately set forth in the opinion of the California Court of Appeal, Fourth Appellate District, Division One and are as follows:

"La Jolla attorney Richard Crake was murdered by Andrew James Powell on May 12, 1981. The death was probably the result of a severe blow to the head. Briefly, in the light most favorable to the judgment, the evidence shows Martin and Crake were embroiled in civil litigation arising from a dispute over a real estate transaction at the Sports Arena Square shopping center. During the course of discovery Martin became dissatisfied with the posture of



the litigation. During a deposition Martin had threatened Crake with violence.

"Michelle Goff worked for Martin's insurance company. Powell was Goff's boyfriend and she introduced him to Martin. Martin hired Powell on March 23, 1981. Martin knew Powell could not make his child support payments. Martin also knew Powell was afraid he would be jailed for failure to pay. Martin used this as leverage and told Powell he wanted Powell to collect money Crake owed Martin. Martin told Powell to collect \$100,000 from Crake and to beat him up.

"Martin gave Powell Crake's picture and business address. When Powell would not go to Crake's business, Martin supplied Crake's home address. Powell and a friend went to this address but discovered Crake no longer lived there. Powell called Martin long distance to tell him this address was incorrect.

"Martin obtained Crake's new address by contacting United States Marshal James Murphy telling Murphy he needed the address to serve papers in conjunction with his civil suit. Murphy provided Martin with Crake's address.





Martin gave this address to Powell along with the keys to Martin's car and a bag containing a gun.

"Powell and a friend drove to Crake's house on May 12, 1981. They arrived at the guard station at approximately 9 p.m. Powell gave the guard a false name. The Crake family had returned from dinner approximately 9 p.m. Powell and his friend rang the doorbell and Crake answered. Powell sent the friend to the car and then told Crake he was there to collect \$100,000 for Martin. Powell and Crake got into a fight. Powell shot Crake in the arm with Martin's gun. Powell hit Crake in the head with the gun between six and sixteen times. The blows eventually caused Crake's death. Crake's wife attempted to stop Powell but he pushed her away and fired the gun at her. Crake's daughter threw shoes and books at Powell.

"Powell covered with blood returned to the friend's car. They drove to Powell's house where he made a toll call to Martin, telling him the dirty work was done. When Goff returned at 10 p.m. she found blood on the carpet, shoes in the bathtub, and blood on Powell's jacket.



Powell disposed of the jacket and the gun in a nearby dumpster scheduled to be picked up the following morning."  
(In re Martin, supra, 150 Cal.App.3d at pp. 156-157.)  
(Petrn., App. A.)

## ARGUMENT

### I

THE PROSECUTOR DID NOT  
COMMIT "GRIFFIN ERROR"  
DURING CLOSING ARGUMENT

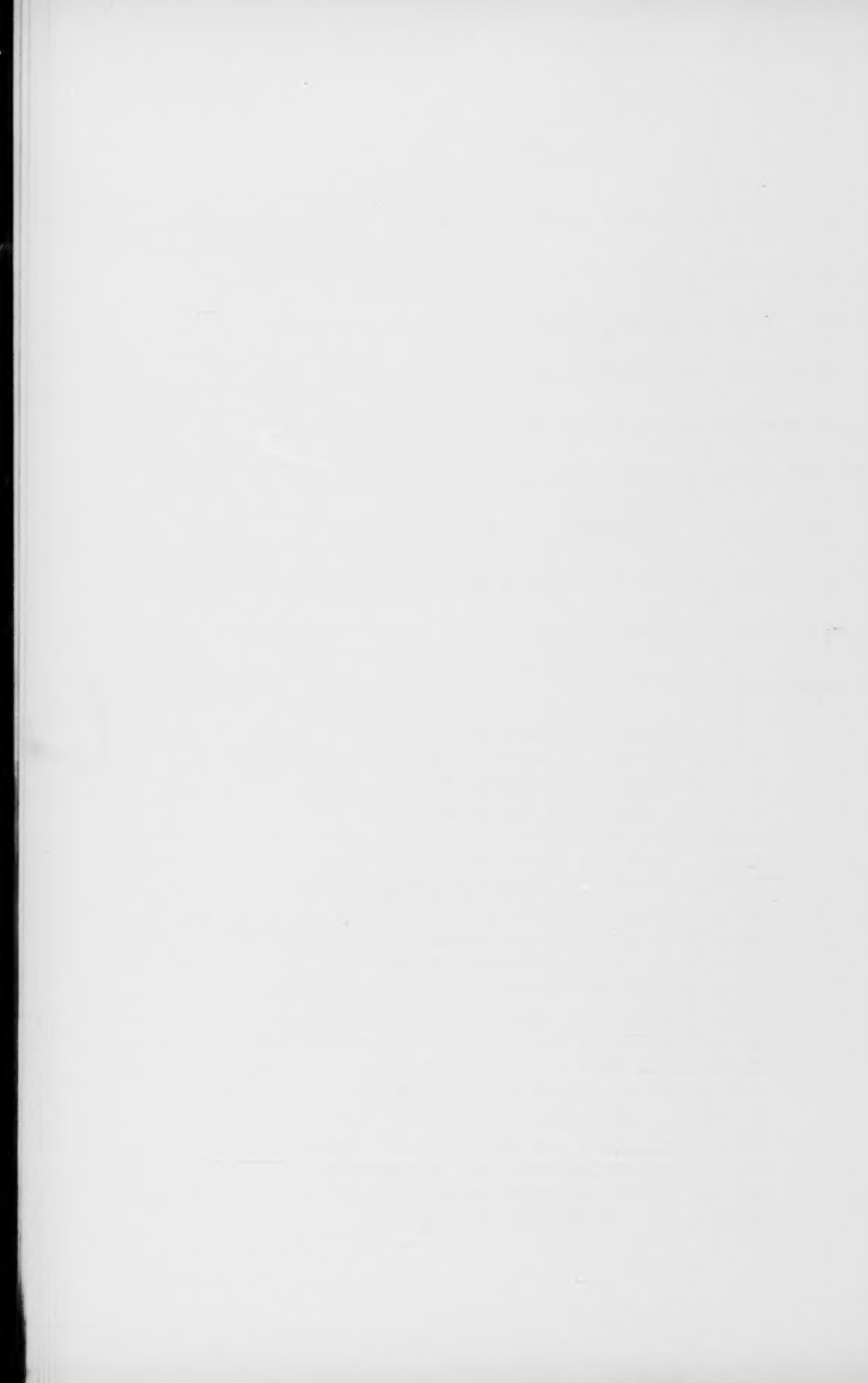
Petitioner first contends the prosecutor committed "Griffin error" (Griffin v. California (1965) 380 U.S. 609, by commenting that neither of the co-conspirators testified. (Petrn., p. 22.) However, a careful analysis of the context in which the statement was made as well as the applicable law reveals the prosecutor did not violate the mandate of Griffin v. California, supra, in this case.

The defense strategy at trial was to attack the testimony of Andrew



Powell in every possible way. (See generally, RT 2263-2299.) Specifically, defense counsel told the jury if they did not believe Powell's testimony the prosecution's case no longer existed. (RT 2281.) As a response to defense counsel's argument, the prosecuting attorney told the jury about the role of circumstantial evidence in a conspiracy case.

"The defense said many times that if Andrew Powell is not believed, there is no case. Let me suggest to you that is not true at all, not true at all. Let me read an instruction. 'It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an expressed or formal agreement. The formation and existence of a conspiracy may be inferred from all the circumstances tending to show the common intent, and may be proved in the same way as any other fact or by circumstantial evidence or by both direct and circumstantial evidence.' Let me



suggest that conspiracy, prosecution cases oftentimes include both conspirators as defendants and none of the conspirators testify. Let me suggest to you that you consider this case in that light for a while. Consider your job as finding whether or not Andrew Powell and Herman G. Martin are guilty of Count I, conspiracy to commit extortion and Count II and Count III and Count IV, both of them are sitting over here on trial. Neither one of them testified. No testimony from either of the coconspirators. You hear the evidence that you heard in this case with out Andrew Powell's testimony? Would you find him guilty?

"MR. MITCHELL: Your Honor, may we approach the bench?

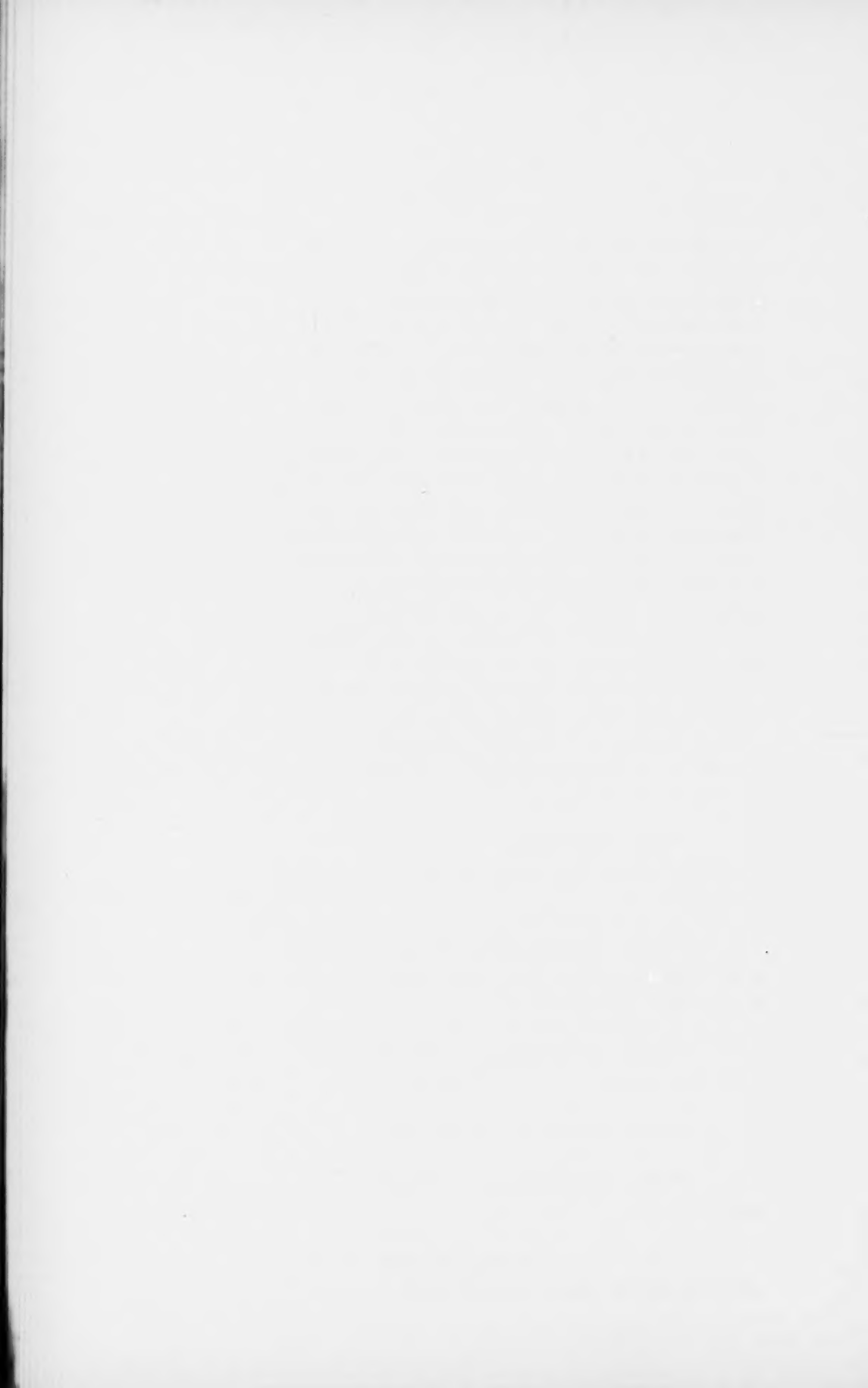
"THE COURT: I don't see any necessity for it, Counsel. You may proceed.

"MR. MITCHELL: With all due respect, your Honor --

"THE COURT: You may.

"MR. MITCHELL: Thank you, sir.

(The following bench conference was reported.)





"MR. MITCHELL: Your Honor, the language was 'neither one of them testifies', and that is a direct comment on my client's failure to testify.

"MR. PIPPIN: That is not a comment.

"THE COURT: Pardon?

"MR. PIPPIN: This is what I said, and that is not a comment on that, and I wasn't making any reference to that at all. I was making an analogy. But there is no -- that they consider this case in terms of neither coconspirator testified, which is the circumstantial evidence.

"THE COURT: Without the facts from --

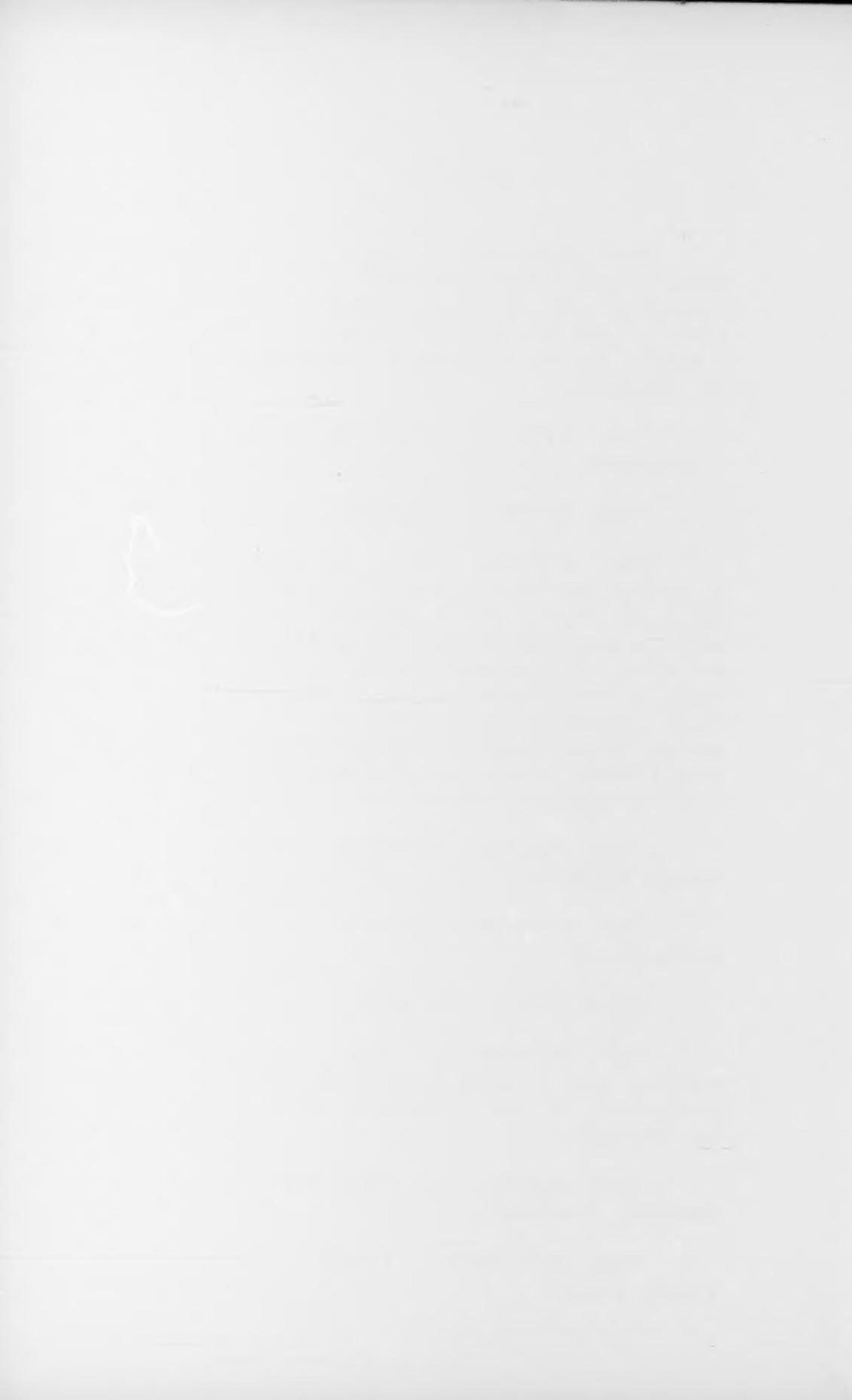
"MR. PIPPIN: Of the conspiracy.

"THE COURT: Right.

"MR. MITCHELL: Your Honor, may I make a motion for mistrial, which I assume will be denied?

"THE COURT: It will be denied, Counsel.

"MR. MITCHELL: thank [sic] you.



(The following proceedings were had in open court in the presence of the jury:)

"MR. PIPPIN: Hopefully, you just witnessed the last bench conference.

"Think about this case in those terms. Now, as I indicated yesterday, it is real easy to downgrade Andrew Powell and show that he is a liar, and then the defense says several times there is no case without Andrew Powell's testimony; if you dis-believe what he tells you, my client is absolutely not guilty. Is that right? I suggest to you that it is not.

"Look at this case like you were prosecuting both Powell and Martin for conspiracy that ended up in the murder of Richard Crake. What evidence do you have? We have got Powell with independent testimony going to Crake's house, trying to find him on May 8, going to the bad address, and a phone call from Powell to Martin's house that night.

"Now, Powell said he talked to Martin. That is what his testimony was. Take that out. You have got a phone toll that proves he



called him. If he wasn't going to Martin's house on behalf -- if he wasn't going to Crake's house on behalf of Martin, why did he call him?

"The same is true on the night of the murder. We know, we know that Powell went there and killed him, and we know he called Martin's house that night by a phone toll. Mr. Mitchell suggests that the testimony, the testimony about that from Andrew Powell, came from his reading police reports. Well, the phone toll isn't a police report. He called his house.

"You know all the motive evidence. That all comes in without regard to Andrew Powell's testimony. Andrew Powell didn't know the ins and outs of that lawsuit. He didn't know the threats that Herman Martin had made to Richard Crake. If all you had in this case was a circumstantial evidence that was presented without regard to Andrew Powell's testimony, would you be convinced beyond a reasonable doubt that Herman Martin put Powell up to what happened? Is there any other explanation for what Powell did?" (RT 2300-2303.)



In Griffin v. California, supra, 380 U.S. 609, the prosecutor had encouraged the jury to draw adverse inferences from the defendant's failure to respond to the testimony against him. The trial judge also had instructed the jury the defendant's failure to testify could be considered against the defendant. This Court held it is a violation of a defendant's constitutional rights to tell the jury in a state criminal trial that a defendant's failure to testify supports an unfavorable inference against him.

However, in Lakeside v. Oregon (1978) 435 U.S. 333, this Court made it clear that the mere fact the prosecutor comments on the fact a defendant has been silent does not constitute "Griffin error." Rather, this Court observed that,

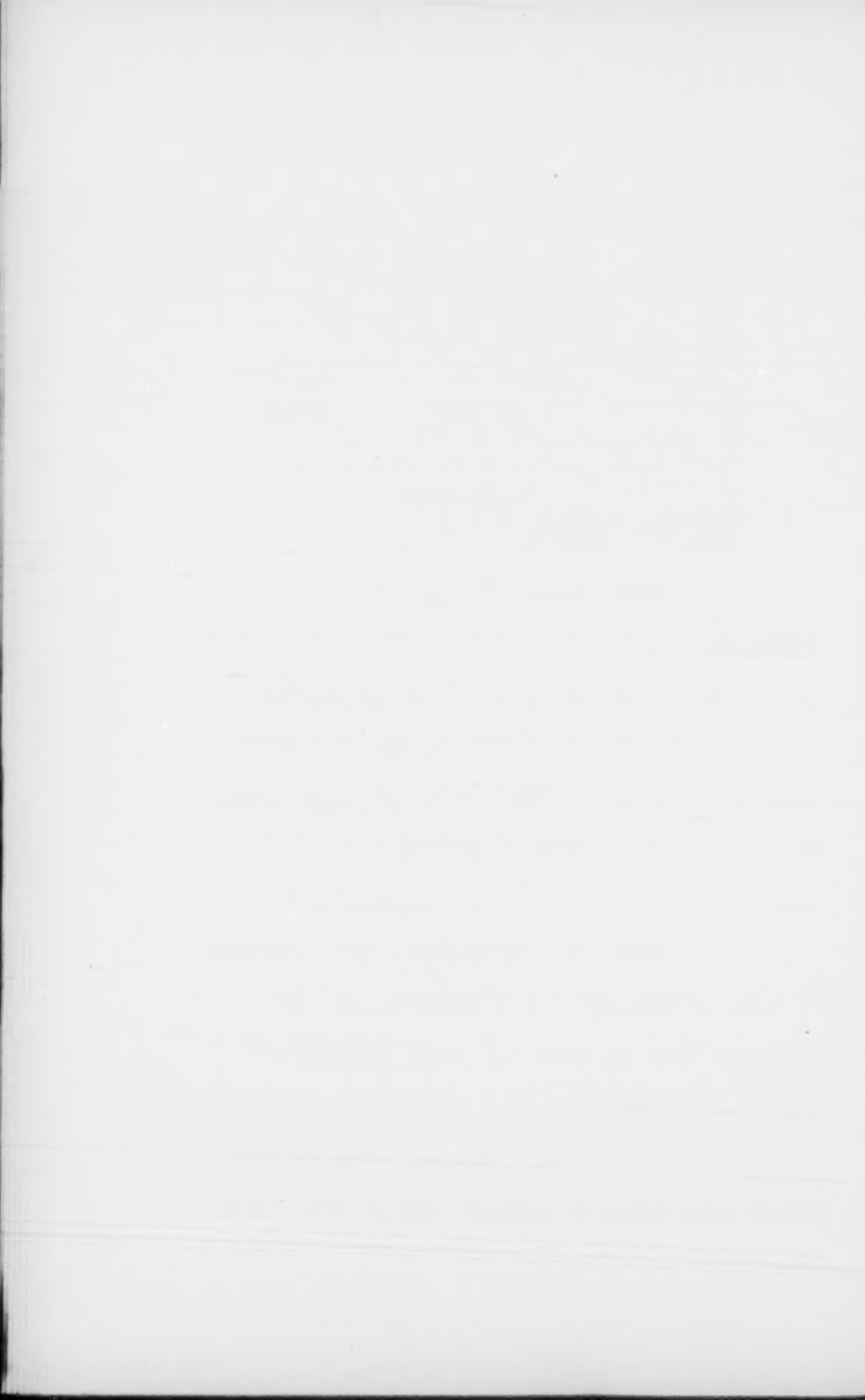




"It is clear from even a cursory review of the facts and the square holding of the Griffin case that the Court was there concerned only with adverse comment, whether by the prosecutor or the trial judge-- 'comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.'" (Lakeside v. Oregon, supra, 435 U.S. at pp. 338-339; emphasis added.)

Similarly, in Carter v. Kentucky (1981) 450 U.S. 288, 298, this Court again noted that "The Lakeside Court reasoned that the Fifth and Fourteenth Amendments bar only adverse comment on a defendant's failure to testify . . . ." (Orig. emphasis.)

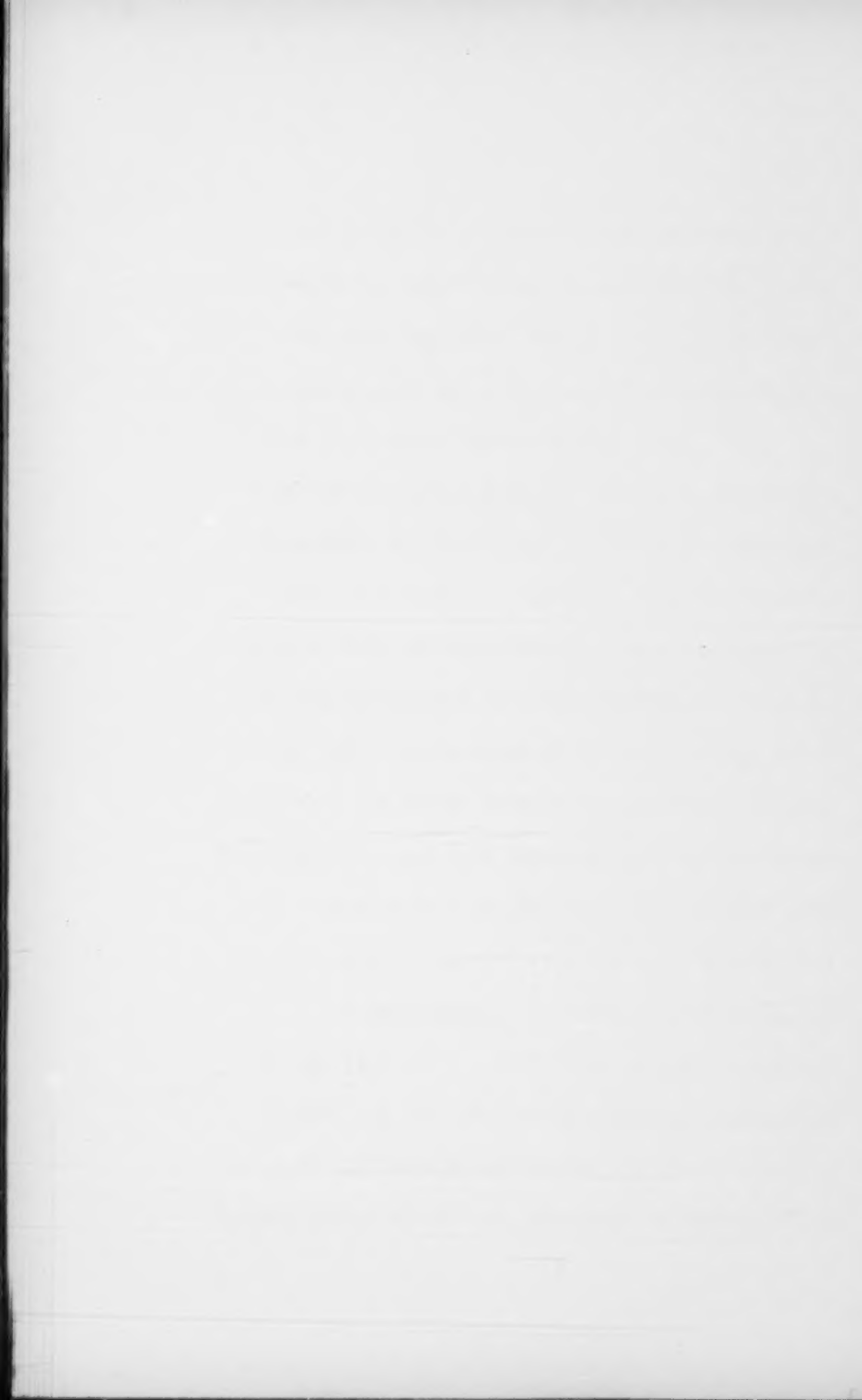
When one considers the context of the prosecutor's comments, it is evident the statements were not an adverse comment on the petitioner's failure to testify. Rather, the prosecutor was merely commenting on the fact



conspiracies are often difficult to prove as they must be proven by circumstantial evidence because the co-conspirators frequently do not testify.

The prosecutor thus did not directly comment on the petitioner's failure to testify or seek to comment adversely on this fact. Rather, the prosecutor was commenting on the state of the evidence and the prosecution's case under the circumstances. As there was no adverse argument made by the prosecutor on the ground the petitioner had not testified, but merely a comment on the state of the evidence, there was no Griffin error here. (Lakeside v. Oregon, supra, 435 U.S. 333; Carter v. Kentucky, supra, 450 U.S. at p. 298.)

Even assuming arguendo the prosecutor's comment could be considered



as Griffin error, petitioner is still not entitled to any relief as any conceivable error was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 24.)

The comment of the prosecutor was brief and mild and not the type of comment which heavily emphasized the fact petitioner had chosen to remain silent. (People v. Vargas (1973) 9 Cal.3d 470, 471-480.) Moreover, the comment did not fill a gap in the prosecution's case or touch a live nerve in the defense. Rather, it was simply a matter of fact comment on the state of the evidence. (Id.)

The jury was also instructed not to draw any unfavorable inferences from the fact petitioner did not testify. (RT 2316.)

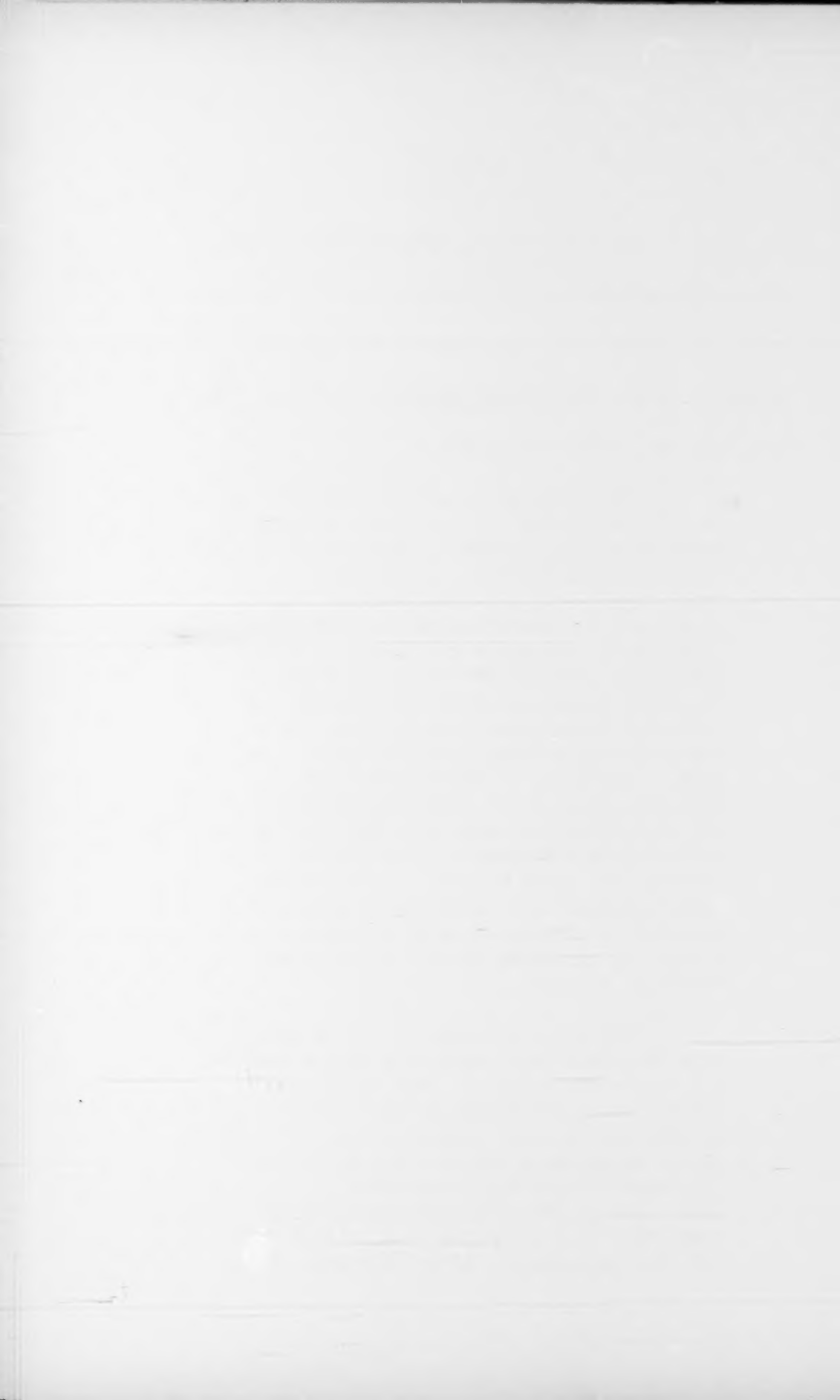


In addition, there is overwhelming evidence of petitioner's guilt here as found by the Court of Appeal.

(Petrn., App. A; In re Martin (1983) 150 Cal.App.3d 148, 163-164.)

"Powell testified Martin solicited him to collect money and beat up Crake. Martin threatened Powell with jail and the loss of his job if he refused to participate. Martin obtained Crake's current address and gave it to Powell. Powell then went to Crake's house, demanded the money, assaulted Crake and killed him. Powell's testimony is corroborated by the testimony of his girlfriend and Martin's other employees. This evidence is sufficient to support conviction for conspiracy to commit extortion and conspiracy to commit assault with a deadly weapon.

"Martin attempts to argue the murder and assault were not in furtherance of the conspiracy because Powell had withdrawn from the conspiracy. This argument is directly contradicted by Powell's testimony of the conversation and his activities the night of the murder. Even though at





times powell refused to comply with Martin's instructions there is no question but that Powell went to Crake's house the night of the murder, demanded the money, assaulted Crake and killed him. Even if Powell was reluctant at various times during the course of the planning stages of the crime, it is apparent he participated exactly as agreed, he so testified, and his testimony is corroborated by circumstantial evidence of other witnesses and the record of telephone calls between Powell and Martin the day and night of the murder.

"A co-conspirator is guilty of any crime committed by his confederate which is a natural or probable act committed in furtherance of the conspiracy or any crime which is one of natural and probable consequence or the object of the conspiracy. (People v. Brawley (1969) 1 Cal.3d 277.) The question of what constitutes a natural and probable consequence is one of fact for the jury. (People v. Drolet (1973) 30 Cal.App.3d 207, 217.)

"A reasonable jury could find the assault and murder were a natural and probable consequence of Martin's instructions to collect the money and



beat up Crake, his giving Powell Crake's address and his providing a gun. Substantial evidence supports this jury's conclusions." (In re Martin, supra, 150 Cal.App.3d at pp. 163-164, fn. omitted.)

Accordingly, any conceivable "Griffin error" was harmless beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. at p. 24.)

As the Court of Appeal concluded:

"Whether Griffin error is prejudicial depends upon whether the comment fills a gap in the prosecution's case or touches a live nerve in the defense. (People v. Medina (1974) 41 Cal.App.3d 438, 462; People v. Morse (1969) 70 Cal.2d 711, 730, cert. den. 397 U.S. 944.)

"In this case the prosecution merely stated the obvious; he simply noted the difficulty proving a conspiracy is that it must often be proved by circumstantial evidence because the conspirators frequently do not testify.

"It is hard to see the argument focused attention on



Martin's failure to testify by asserting that even without Powell's testimony, sufficient evidence supported a finding of conspiracy. The trial court's instructions telling the jury Martin's failure to testify could not be used to infer his guilt would have cured any potential harm from this limited comment." (Petn., App. A; In re Martin, supra, 150 Cal.App.3d at p. 166; fn. omitted.)

## II

THE CONSTITUTION  
DOES NOT COMPEL  
TRIAL COURTS TO  
GRANT IMMUNITY TO  
DEFENSE WITNESSES  
SIMPLY BECAUSE THE  
WITNESSES POSSESS  
POTENTIAL EXCULPATORY  
INFORMATION FOR  
THE DEFENSE

Petitioner contends the Fifth and Sixth Amendments to the United States Constitution compel a trial court to grant defense witnesses immunity from

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prosecution where the defense witnesses have information helpful to the defense. (Petrn., p. 37.)<sup>1/</sup> This contention is meritless.<sup>2/</sup>

Recently, this issue was presented in the case of Autry v. McKaskle (1984) \_\_\_\_ U.S. \_\_\_\_, 79 L.Ed.2d 906. This Court denied the petition for writ of certiorari in that case. However, the dissenting opinion of Justice Marshall, quoting from a Fifth Circuit decision, set forth the current state of the law within the federal system on this issue.

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1. Petitioner's argument only addresses the Sixth Amendment issue. However, his Questions Presented address both issues.. (Petrn., pp. i, 37.)

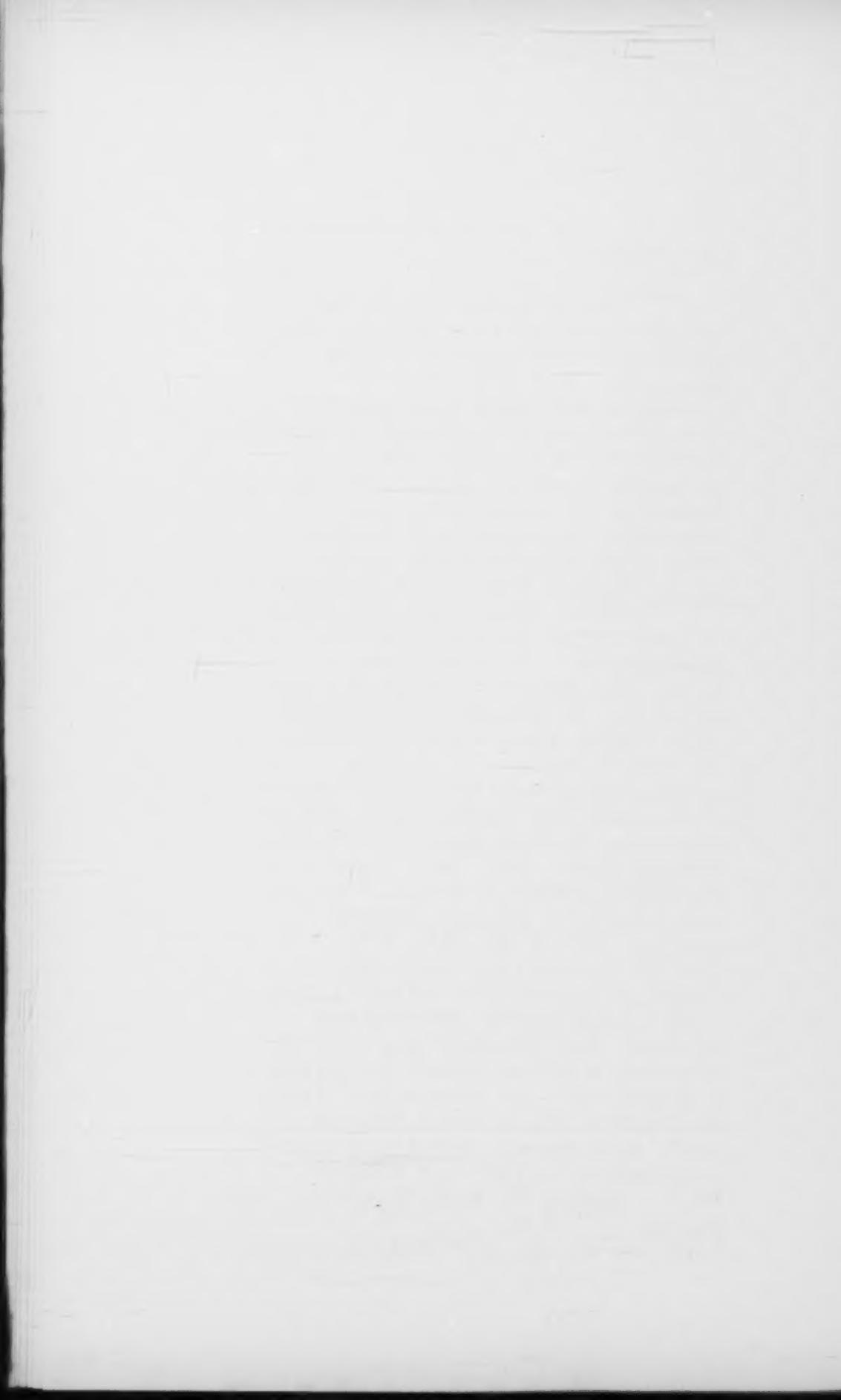
2. Penal Code section 1324 deals with prosecutorial grants of immunity. It is set forth in Appendix A.





"3. As the Fifth Circuit has noted:

"The Supreme Court has not decided whether courts may grant defense witnesses use immunity, and the circuit courts which have addressed the issue have produced widely divergent opinions. On the question whether judicial use immunity is necessary for essential exculpatory testimony, the courts have split three ways. The Third Circuit . . . held that such immunity is available in certain circumstances. On the other hand, the Seventh, Eighth, and District of Columbia Circuits have ruled that such immunity is unavailable . . . The remaining circuits which have addressed the issue have denied immunity in the specific cases before them, but left open whether immunity would ever be available.' United States v. Thevis, 665 F.2d 616, 639 (1982) (citations omitted). Although the Fifth Circuit has never explicitly determined whether due process may require a trial court to grant a defendant use immunity, its decisions imply that courts lack such power under any circumstances. Id., at 639, n 25." (Autry v. McKaskle, supra, U.S., 79 L.ED.2d at pp. 907-908, fn. 3.)



A review of the cases from the various circuits reveals the better rule is that neither the Fifth nor Sixth Amendments compel a trial court to grant immunity to a defense witness simply because the witness may be able to offer exculpatory evidence.

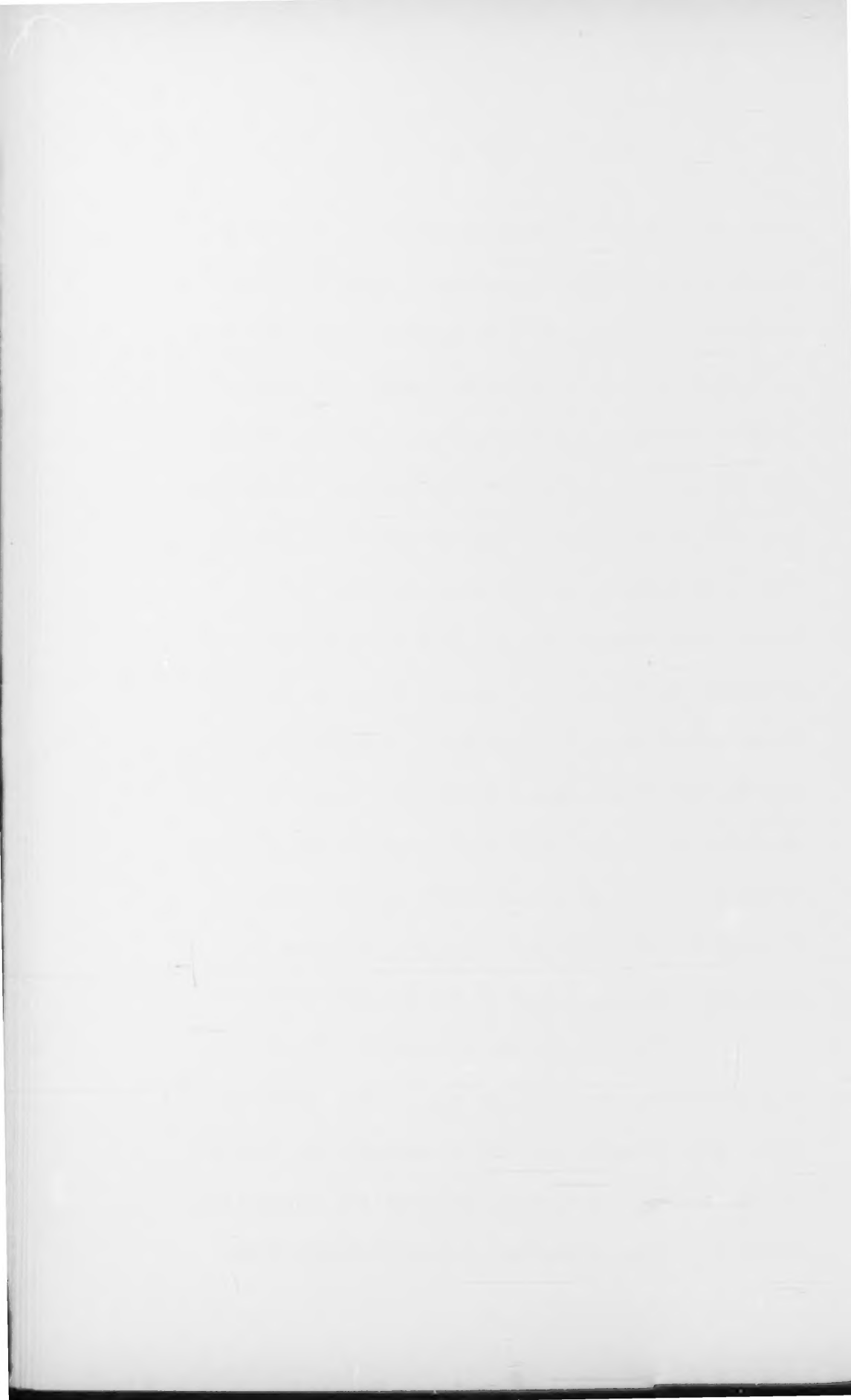
First, with regard to a Sixth Amendment claim, it is well settled the Sixth Amendment does not, of its own force, place upon either the prosecutor or the court any affirmative obligation to secure testimony from a defense witness by replacing the protection of the self-incrimination privilege with a grant of immunity. (United States v. Turkish (2nd Cir. 1980) 623 F.2d 769, 774.)

Second, the claim under the Fifth Amendment must fail as well. One argument raised by the defense is the



need to equalize the powers of the prosecution and the defense. However, a criminal trial is not symmetrical as the prosecution and defense have different rules, powers, and rights. Thus, there can be no due process violation based on any alleged unfair advantage inuring to the government which may or may not grant use immunity to its witnesses and thereby indirectly impact on the defendant's ability to present a defense. The Fifth Amendment does not create general obligations for courts or prosecutors to obtain evidence protected by a lawful privilege. (United States v. Turkish, supra, 623 F.2d at pp. 774-775.)

The second argument under the due process clause is that the need to have all the truth told weighs in favor of allowing judicial grants of immunity. However, the Federal Constitution does



not require the government to assist the defense in extracting from others evidence the government does not have. (United States v. Turkish, supra, 623 F.2d at p. 775.) Moreover, the idea of total truth is not realistic given the fact much evidence is protected by privileges including the attorney-client privilege which protects the defense. (Id.)

Third, granting a witness use immunity does not significantly improve the legal position of the holder of the privilege as he is still technically subject to transactional prosecution. (United States v. Turkish, supra, at p. 775.)

However, it does impinge on many public interests, and may severely limit the ability of the state or federal government to prosecute cases.

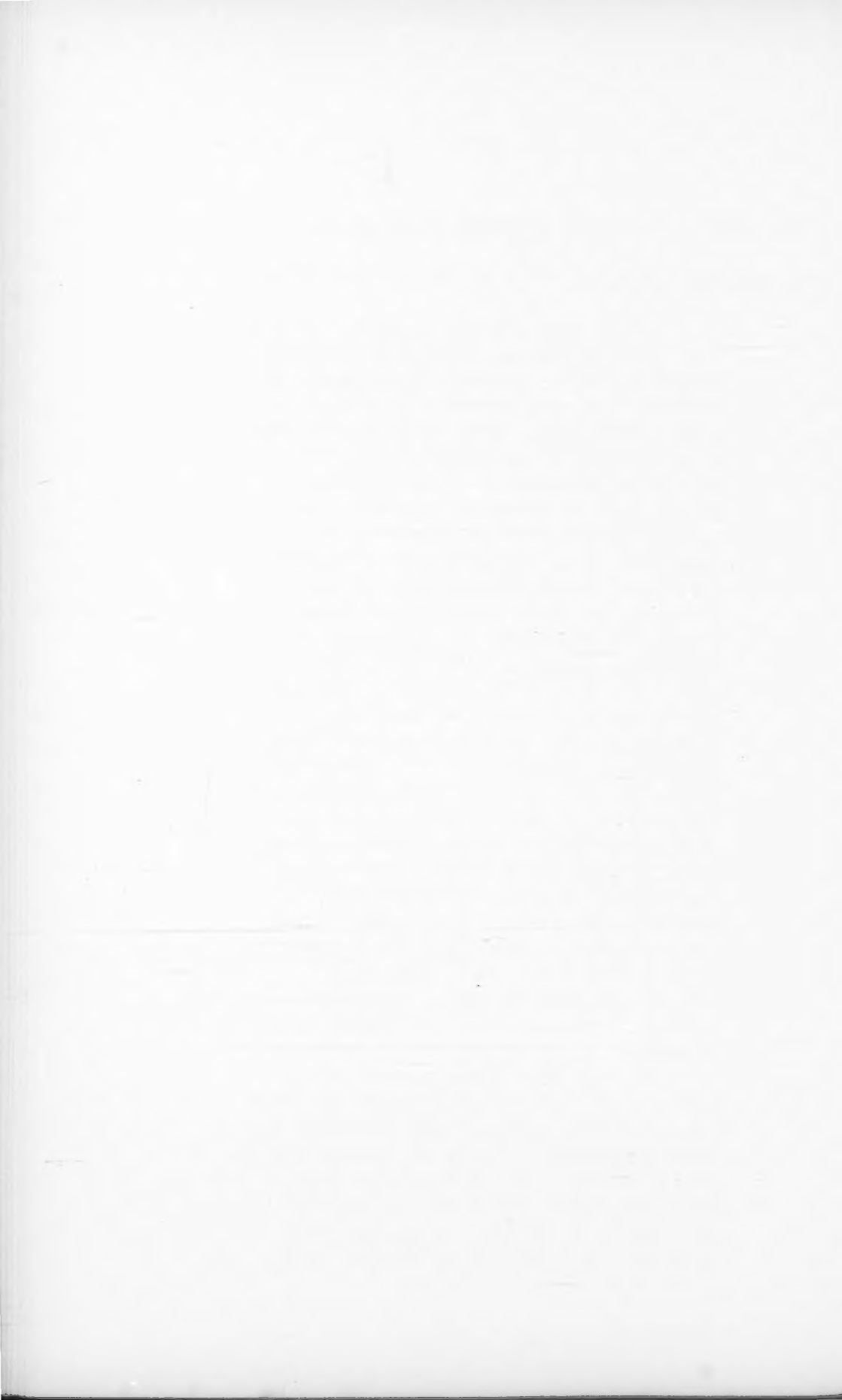




As was noted in United States v.

Turkish, supra, 623 F.2d at p. 775:

"In the first place, while the prosecution remains theoretically free under Kastigar to prosecute a witness granted use immunity, the obstacles to a successful prosecution can be substantial. The Government has a 'heavy burden' to prove that its evidence against the immunized witness has not been obtained as a result of his immunized testimony. Kastigar v. United States, supra, 406 U.S. at 461, 92 S.Ct. at 1665. While this burden can be met by cataloguing or 'freezing' the evidence known to the Government prior to the immunized testimony, that technique is not available when continuing investigations disclose vital evidence after, though not resulting from, the immunized testimony. See SEC v. Stewart, 476 F.2d 755, 762 (2d Cir. 1973) (Timbers, J., dissenting). Moreover, to meet its burden of proving that prosecution of the immunized witness was not benefitted in any way by his immunized testimony the prosecutors most knowledgeable about an investigation may in some circumstances be obliged to forgo any further contact with the witness and



arrange for a new team of investigators and prosecutors to pursue the case against him. See United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976).

"Secondly, awareness of the obstacles to successful prosecution of an immunized witness may force the prosecution to curtail its cross-examination of the witness in the case on trial to narrow the scope of the testimony that the witness will later claim tainted his subsequent prosecution. While the witness cannot prevent prosecution and secure an immunity 'bath' by broadening the scope of his answers, as he could if testifying under a grant of transactional immunity, his fulsome answers may substantially lessen the likelihood of any successful prosecution.

"Finally, there is considerable force to the Government's apprehension that defense witness immunity could create opportunities for undermining the administration of justice by inviting cooperative perjury among law violators. Co-defendants could secure use immunity for each other, and each immunized witness could exonerate his co-defendant at



a separate trial by falsely accepting sole responsibility for the crime, secure in the knowledge that his admission could not be used at his own trial for the substantive offense. The threat of a perjury conviction, with penalties frequently far below substantive offenses, could not be relied upon to prevent such tactics." (United States v. Turkish, supra, 623 F.2d at p. 775.)

Finally, and perhaps of major import, allowing the court to make a determination as to the grant of immunity breaches the fundamental separation of powers between the court, the prosecutor, and the defense. At defense request, the court would place itself in the position of evaluating the prosecution's case, witnesses, the crimes that had been committed, and determining whether individuals should or should not be prosecuted. This allows the defense



and the court to manage criminal prosecutions. However, this is something that citizens of this country expect local prosecutors to decide.

Moreover, there is something troubling about a court evaluating the prosecution's case and potential witnesses before deciding to grant or deny immunity and then sitting either as the trier of fact or trial judge. No matter how well intentioned the trial judge, and even if the trial is heard by a different judge, the result inevitably places the judiciary in the position of having made a prosecutorial decision in favor of or against one of the parties to the criminal trial. (See, e.g., United States v. Thevis (5th Cir. 1982) 665 F.2d 616, 640.)

Accordingly, for these reasons, the better rule is that the





trial court should not be vested with any authority to grant immunity.

Many federal decisions have supported this position. Trial courts need not grant immunity to defense witnesses simply because the witnesses possess potential exculpatory information available from other sources. (United States v. Gottesman (11th Cir. 1984) 724 F.2d 1517, 1524; Autry v. Estelle (5th Cir. 1983) 706 F.2d 1394, 1400-1401, cert. denied \_\_\_ U.S. \_\_\_ 79 L.Ed.2d 906; United States v. Heffington (5th Cir. 1982) 682 F.2d 1075, 1081; United States v. Carlin (11th Cir. 1983) 698 F.2d 1133, 1136; United States v. Thevis, supra, 665 F.2d at pp. 638-640.)

It is also clear that nothing under California law required the court here to grant the defense witnesses any judicial use immunity. (People v.



Sutter (1982) 134 Cal.App.3d 806, 813-816; In re Martin, supra, 150 Cal.App.3d at p. 161 (Ptn., App. A.)

In addition, while individual states or federal jurisdictions may wish to vary the power of a trial court to control prosecutorial grants of immunity, this seems to be a matter for each state or federal jurisdiction to decide. It does not appear to be a matter that is compelled by either the Fifth or Sixth Amendments.

It must also be noted the cases petitioner cites to support his argument are actually not helpful in this case. In United States v. Morrison (3d Cir. 1976) 535 F.2d 223), the Court of Appeal concluded due process may demand the government grant a witness use immunity where prosecutorial misconduct caused the defendant's principal



witness to withhold testimony out of fear of self-incrimination. In Morrison the prosecutor repeatedly threatened a potential defense witness with prosecution and conducted a highly intimidating interview with her in his office. In essence, the prosecutor coerced the witness into taking the Fifth Amendment to protect herself.

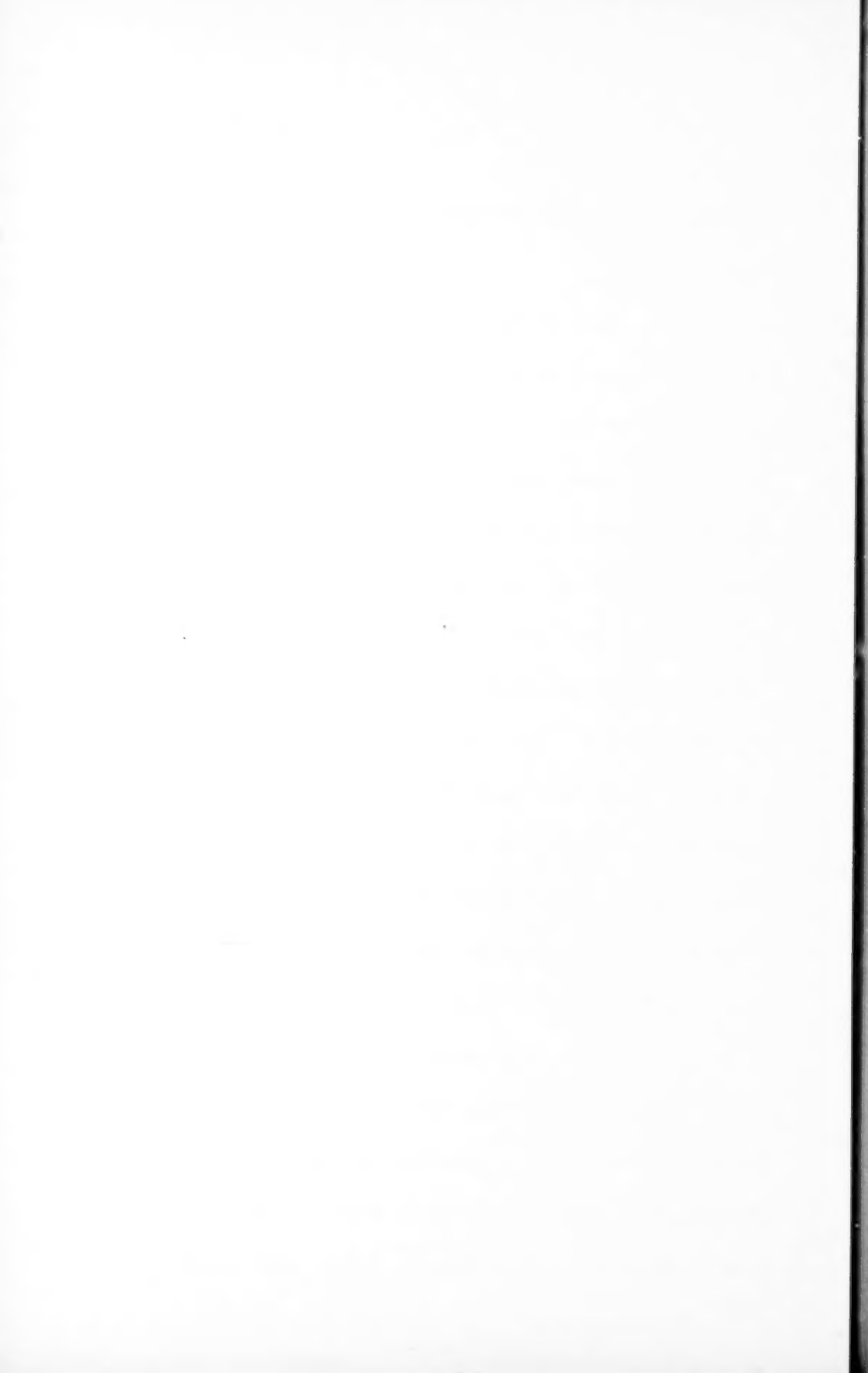
Nothing of this sort happened here. Although petitioner throws the term misconduct about liberally, no argument was ever made in the trial court that the prosecutor committed misconduct with regard to the three defense witnesses at issue or that this fact compelled the court to grant immunity. The defense simply argued the court should grant immunity to three witnesses because they could help the



defense. (RT 2059-2060, 2140-2144,  
2144-2154.)

Petitioner here does complain of prosecutor misconduct; however, not with regard to these witnesses. Rather, he claims they were indirectly intimidated because another defense witness was arrested after testifying. However, the record belies this assertion. The record reveals that, without advising the prosecutor or the court in advance, defense counsel had the witness -- Steve Aguilar -- testify in the presence of the jury that he gave Powell the murder weapon, got it back, and got rid of the gun. (RT 1899-1972.)

Once the witness for the first time admitted in the presence of the jury he was an accessory to murder, the prosecutor had no choice but to arrest him. However, the fault here was with





defense counsel for not making an offer of proof before the witness testified so the court and the prosecutor could determine whether the witness should testify out of the presence of the jury. Indeed, the court chided defense counsel the next day for what, in essence, was his own impropriety in this matter not the prosecutor's. (RT 1991-1997.)

Thus, the prosecutor did not commit any misconduct which intimidated any of the three witnesses petitioner sought to have granted immunity. Consequently, the Morrison case does not assist petitioner.

The other case petitioner primarily relies on is Government of Virgin Islands v. Smith (3d. Cir. 1980) 615 F.2d 964. There the court held there may be a duty to grant immunity where a defense witness can offer



exculpatory evidence if the government has no strong interest in withholding use immunity. The court then remanded the case for a hearing to let the district court weigh the countervailing interests.

That case is distinguishable for several reasons. First, it was a simple robbery case and the government may not have had any legitimate basis for denying immunity. Here the prosecutor was facing the possibility of granting immunity to individuals who may have aided in a murder or been accessories to a murder.

Moreover, while the language of Smith is very broad, the case itself arose in a situation similar to the Morrison case where there was some suggestion of prosecutor misconduct. The Virgin Islands Attorney General's



office had offered to give the witness at issue immunity. Out of courtesy the United States Attorney was contacted for consent. However, for some unexplainable reason, that agency refused to go along with the decision to grant immunity. (Government of Virgin Islands v. Smith, supra, 615 F.2d at p. 967.)

Thus, the Smith case is also not compelling on its facts. Indeed, in United States v. Lord (9th Cir. 1983) 711 F.2d 887, which petitioner cites, the United States Court of Appeals for the Ninth Circuit indicates the primary basis for the holding in Smith was prosecutorial misconduct. (Id., at pp. 891-892.)

"The Herman court did not order immunity because no evidence of prosecutorial misconduct appeared there. The first application of the Herman standard occurred in Virgin Islands v. Smith, 615 F.2d 964



(3d Cir. 1980.) In Smith the court determined that the record revealed a prima facie showing of prosecutorial misconduct. There the local juvenile authorities had exclusive jurisdiction over an essential defense witness. Although the local authorities agreed to immunize the witnesses, they made the offer of immunity contingent on the consent of the United States Attorney, the official entrusted with statutory authority to make such a grant. For reasons unexplained either at trial or on appeal, the federal prosecutor refused to consent, and the potentially exculpatory testimony was not presented to the jury. The Third Circuit ordered the district court to hold an evidentiary hearing to determine whether the defense witness's testimony would be relevant to the defendant's case and whether the federal prosecutor, in refusing to consent to extending immunity to the defense witness, acted with a deliberate intention of distorting the fact-finding process. Id. at 969. If the district court found that prosecutorial misconduct had prevented the defense witness from giving relevant testimony, then the court was directed to acquit the defendant unless the prosecutor





granted use immunity to the defense witness." (United States v. Lord, supra, 711 F.2d at pp. 890-891.)

The same point is made in Grochulski v. Henderson (2d Cir. 1980) 637 F.2d 50, 52-53, with regard to Smith. In addition, the Lord decision notes that Smith dealt with a situation where the witness at issue clearly would have exonerated the defendant. (Id., at p. 891, fn. 2.) Such a situation is not presented here. The witnesses may have aided the defense, but none of them would have clearly exonerated petitioner.

Finally, the decision in Lord, like Smith, is based on prosecutorial misconduct, and not some general requirement the defense witnesses be given immunity. (Grochulski v. Henderson, supra, at p. 892.) Consequently, the

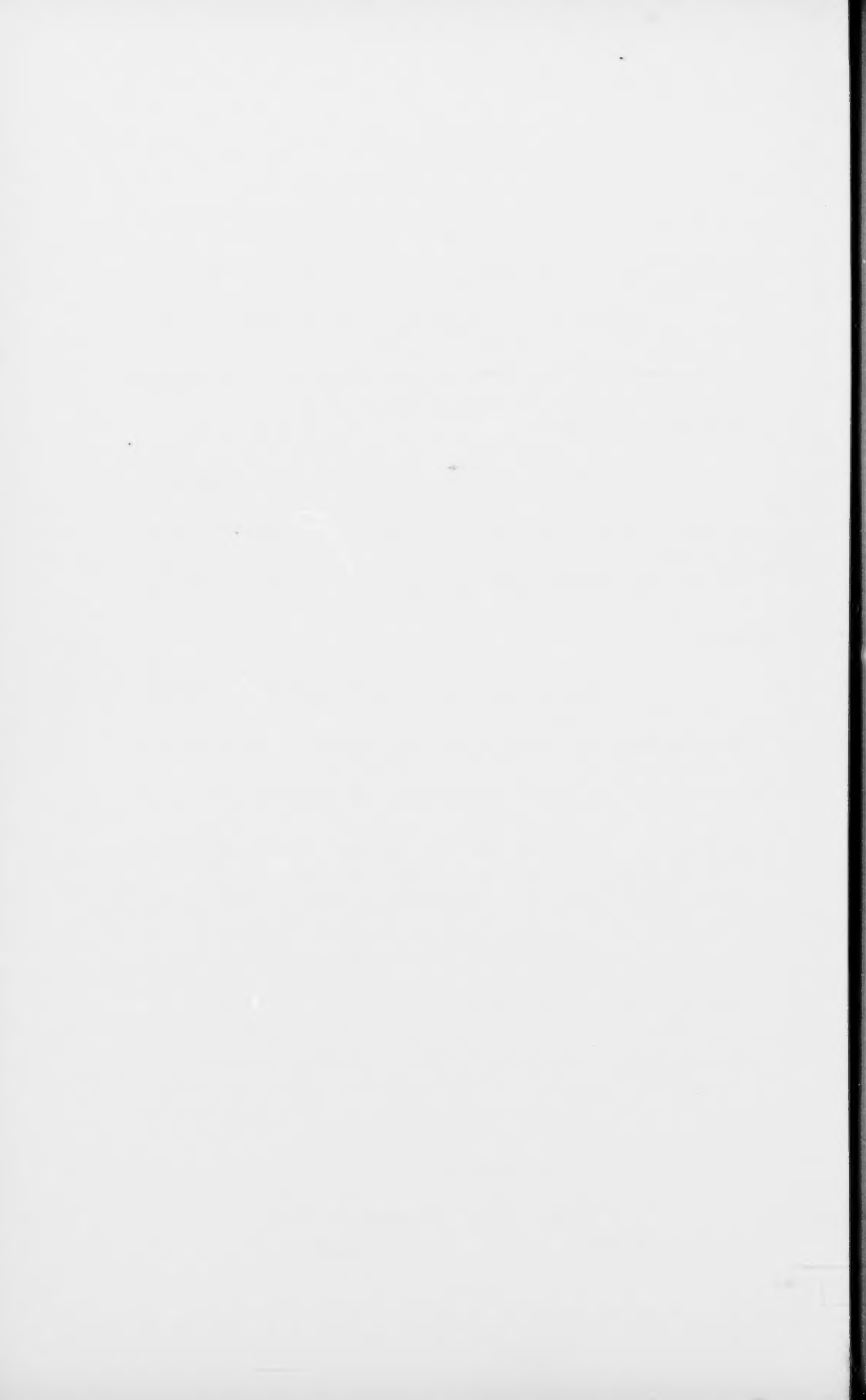


Lord decision is not helpful to petitioner in this case where there was no real evidence of prosecutor misconduct with regard to the witnesses who claimed the privilege.

Thus, none of the cases petitioner heavily relies on to support his position have any applicability to this case.

Finally, mention must be made of survey of the law in this country in the most recent edition of American Law Reports. There it is noted that absent some special circumstances such as prosecutor misconduct or some unusual equity weighing in the favor of the defendant, the defense simply cannot require a trial court to grant immunity to a defense witness.

"Sec. 2. Summary and  
comment



"It is generally accepted, as a reality of the process of criminal prosecution, that, on occasion and where the need of the government will be served thereby, immunity from prosecution may be granted to a codefendant or other prosecution witness in exchange for testimony regarding the crime under investigation. The avowed purpose of such immunity is to permit the state to compel necessary testimony for the purpose of effecting criminal prosecution in circumstances where the absence of such testimony would lead to the release of suspected individuals to the detriment of society.

"As a general rule, however, the defendant in a criminal prosecution has not been afforded a similar opportunity to compel testimony of witnesses. This denial has been based on a variety of grounds and has few exceptions. Thus, for example, the courts have declined to extend to the defendant the right to grant, or to compel the prosecution to grant, immunity from prosecution to defense witnesses on the grounds that such right is vested solely in the prosecution as a result of legislative grant and that neither the court nor the defendant, acting alone or in concert,



could compel the prosecution to exercise its authority.

"Similarly, the courts have been reluctant to accept constitutional justification for extending the capacity to immunize witnesses. This refusal has withstood specific constitutional arguments, such as that the refusal to allow a defendant to compel immunity for defense witnesses was a denial of due process of law or the denial of the defendant's right to present his own witnesses. Likewise, arguments that the defendant, as a result of the refusal to extend immunity to defense witnesses, has been denied a fair and equal trial have met with little success in the courts. It should be noted, however, that there is some judicial authority for upholding a grant of immunity to a defense witness where prosecutorial conduct was so flagrant that the basic fairness of the trial was put into question. However, such courts have sometimes required that there be an affirmative showing that some action on the part of the prosecution, in addition to the withholding of immunity from a defense witnesses, [sic] would deny the defendant a fair and equal trial absent the grant of such immunity.





"There is an additional line of support, among the commentators, for the proposition that defense witnesses should be granted the limited form of use and derivative use immunity where to do so would not adversely affect the prosecution's ability to subject these witnesses to future prosecution. The factual circumstances envisioned by the commentators would occur where the prosecution had ample additional evidence with which to pursue the witness and where the denial of immunity would preclude the defendant's exercise of his Sixth Amendment right to present witnesses. It should be noted, however, that the main direction of these arguments is equitable, and there is no authority for the proposition that the defendant has an affirmative right to compel the grant of immunity in any instance. This being the case, some additional factor would seem necessary to support the defendant's claim for immunity as being essential to a fair and equal trial. Thus, although use and derivative use, rather than transactional, immunity constitutes a sufficient substitute for Fifth Amendment protection, the courts have been reluctant to extend the immunity power



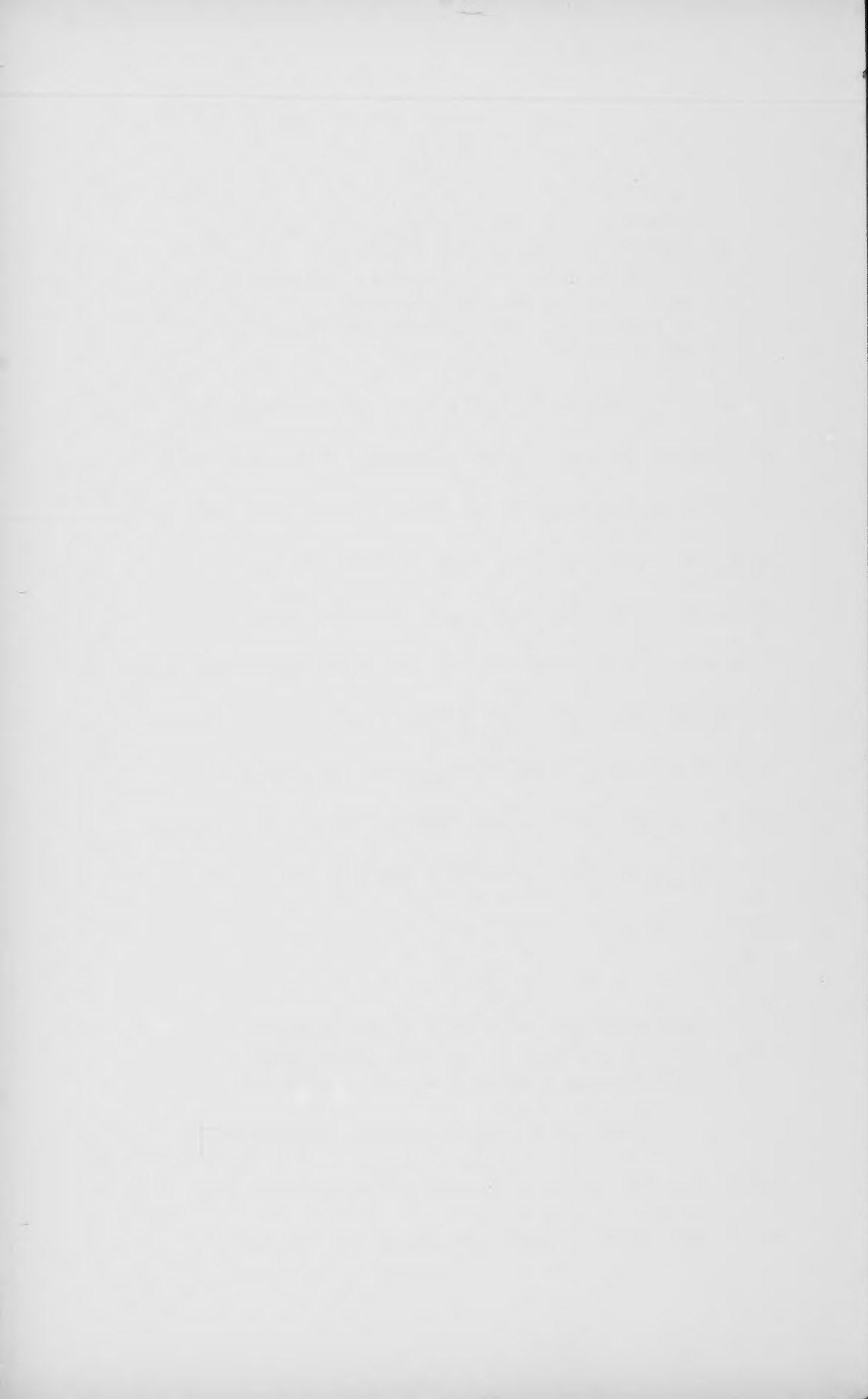
beyond the legislatively mandated purpose of enabling the prosecutor to properly perform the duties of his office." (4 A.L.R.4th, pp. 620-621; fns. omitted.)

Accordingly, as there was no evidence of any any serious misconduct by the prosecutor in this case and no real authority for the court to grant immunity to defense witnesses, petitioner's contentions here are meritless. (United States v. Hunter (10th Cir. 1982) 672 F.2d 815, 818; State v. Cheadle (N.M. 1983) 681 P.2d 708, 712-713; State v. Jeffers (Ariz. 1983) 661 P.2d 1105, 1125-1126.)

### III

THE PROSECUTOR DID NOT COMMIT  
ANY MISCONDUCT WHICH RENDERED  
THE TRIAL FUNDAMENTALLY UNFAIR

Petitioner finally contends this Court should grant a petition for writ of certiorari because of three



instances of prosecutor misconduct.  
(Petn., p. 56.) In making this argument petitioner neglects to consider simply alleging prosecutor misconduct is not enough to warrant the granting of relief in the federal court system where a state court trial is being reviewed. Rather, it must be shown from evaluating the totality of the circumstances that the conduct rendered the trial fundamentally unfair. (Donnelly v. DeChristoforo (1974) 416 U.S. 637; Angel v. Overberg (6th Cir. 1982) 682 F.2d 605.)

"The first instance complained of occurred during the questioning of Deputy District Attorney Charles Hayes.

"Q: Did that deal with things in his background?

"A: That's right.

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"Q: What was Martin's response?

"A: Well, I specifically asked him whether he had any connection with Department of Justice.

"Q: Did he tell you the answer to that?

"A: He said, yes, he did. He was connected with the Department of Justice. I asked him whether he was acquainted with the Mafia activities in New Jersey and he said -- " (Petrn., App. A; In re Martin, supra, 150 Cal.App.3d at p. 166.)

The court sustained a defense objection to the question and advised the jury to disregard the question. (RT 1629.) It is clear the asking of a question which may have resulted in some inappropriate information coming before the jury did not render the trial fundamentally unfair. In a case where petitioner was charged with murder and conspiracy, the jury would hardly be





prejudiced or the trial fundamentally impaired by a vague reference to the Mafia. Moreover, the Court of Appeal concluded the jury understood the cautionary instruction of the court and applied this instruction. (Petr., App. A; In re Martin, supra, 150 Cal.App.3d at p. 165.)

Petitioner also complains of two comments made by the prosecutor during closing argument. At one point during closing argument the prosecutor analogized petitioner's control of his witness to the picture on the cover of the book control of his witness to the picture on the cover of the book "The Godfather." The prosecutor also analogized the testimony of Powell to that of Jimmy Fratianno. Neither of these comments during closing argument had any fundamental impact on the fairness of



the trial and do not warrant this Court granting petitioner any relief.

As the Court of Appeal noted in disposing of these two claims by petitioner:

"During closing argument the district attorney attempted to discredit defense testimony by an illustration "inspired" by the cover of the book The Godfather:

"'Okay. Well, I want to talk about the credibility of some witnesses for a little while, and I am reminded of a popular book that came out a few years ago, and it was also a successful movie; a book called "The Godfather". I am reminded of that book, at least the cover, the cover of that book. I don't know if any of you read it, but the cover of that book has the name on it, and I can't remember exactly what it is. It is either a hand or some figure, and there is strings going down to the words and the name, I think, like a puppet; like a person pulling the strings on a puppet. A vision of the cover of that book came to my mind when some



defense witnesses testified in this case.

"For example, Marcia Sharpe. She is the daughter of the defendant. Okay. She got on the stand as a defense witness, and the defense pulled a string for April 6. Her testimony was, April 6 my father was on a couch about 9:30 in his office and had to be taken to the doctor. That is the response the April 6 string got.

"Okay. I cross-examined her, tried to cross-examine her about that. I pulled an April 7th string, or April 6th string. "Who else was there?" "I don't remember." "Was Powell around?" "I don't remember." "When did your father come back to work?" "I don't remember." This is just because the wrong person was pulling the strings.'

"Even though this illustration was unnecessary and may have been offered in bad faith, it does not amount to a dishonest act or an intent to persuade the jury by deceptive, reprehensible means. (People v. Strickland (1974) 11 Cal.3d 946, 955.) Furthermore, in order to preserve this argument on appeal an objection must be made when the comment

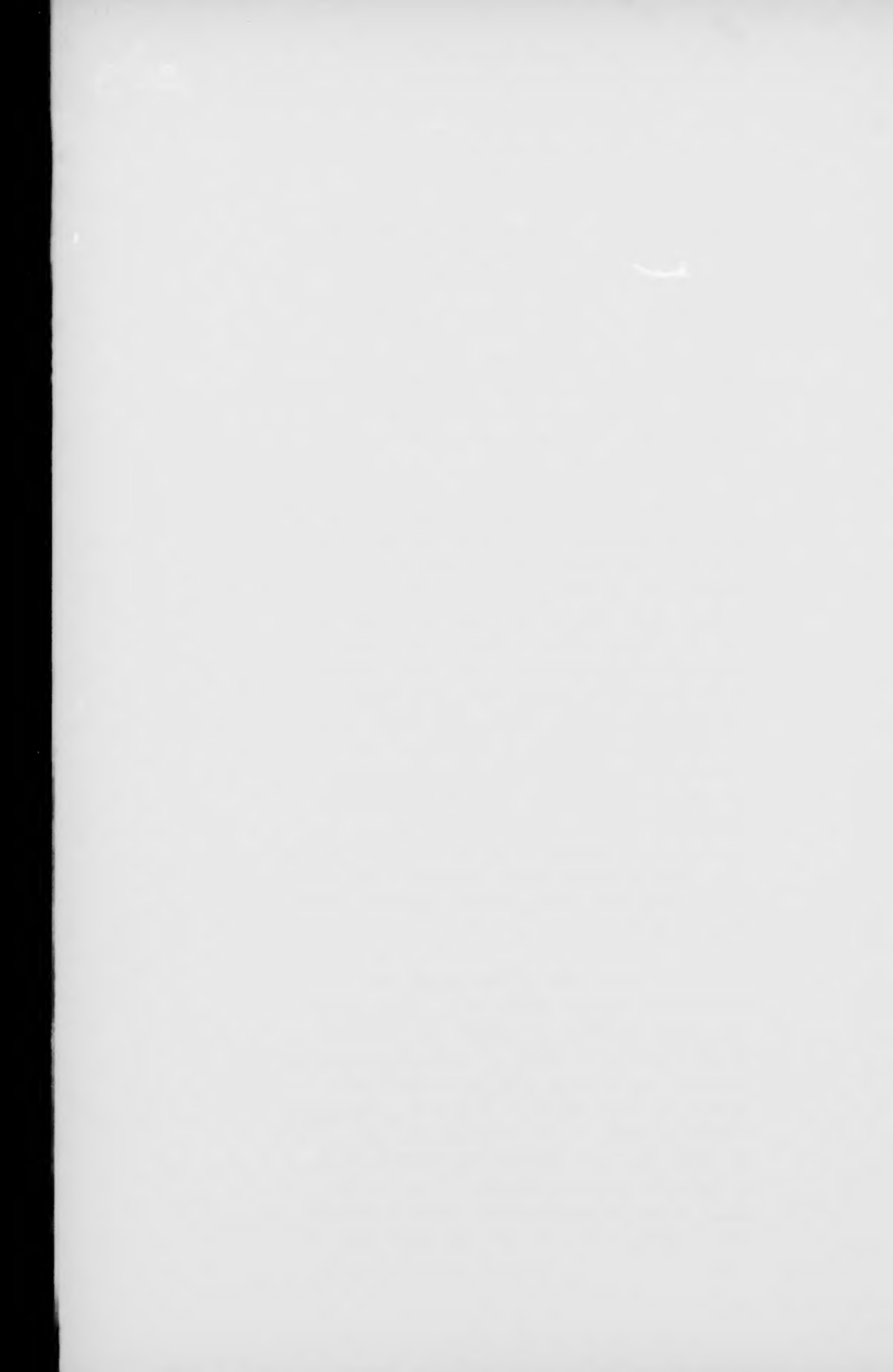


is made in order to give the trial judge an opportunity to cure any harm caused by the comment. (People v. Green (1980) 27 Cal.3d 1, 27, 34.)

No such objection was made here and an admonishment could have cured any potential prejudicial effect of the illustration.

"Martin last complains of the prosecution's analogy of Powell's testimony to the testimony of Jimmy Fratianno: 'So, you know it is not hard in a case like this, in any conspiracy case, to run down the credibility of, or the character of, one of the coconspirators. People who conspire together to commit crimes are not decent, good, law-abiding, upstanding people. When one of them gets on the stand and testifies, it is easy to run down their credibility.'

"'Let me give you an example of a guy who has been in the press recently, Jimmy Fratianno. The guy has been a crook all his life. He has been a hit man. Okay? He has testified. [At this point in response to defense objection a bench conference was held and the prosecutor instructed to forego this illustration.]'

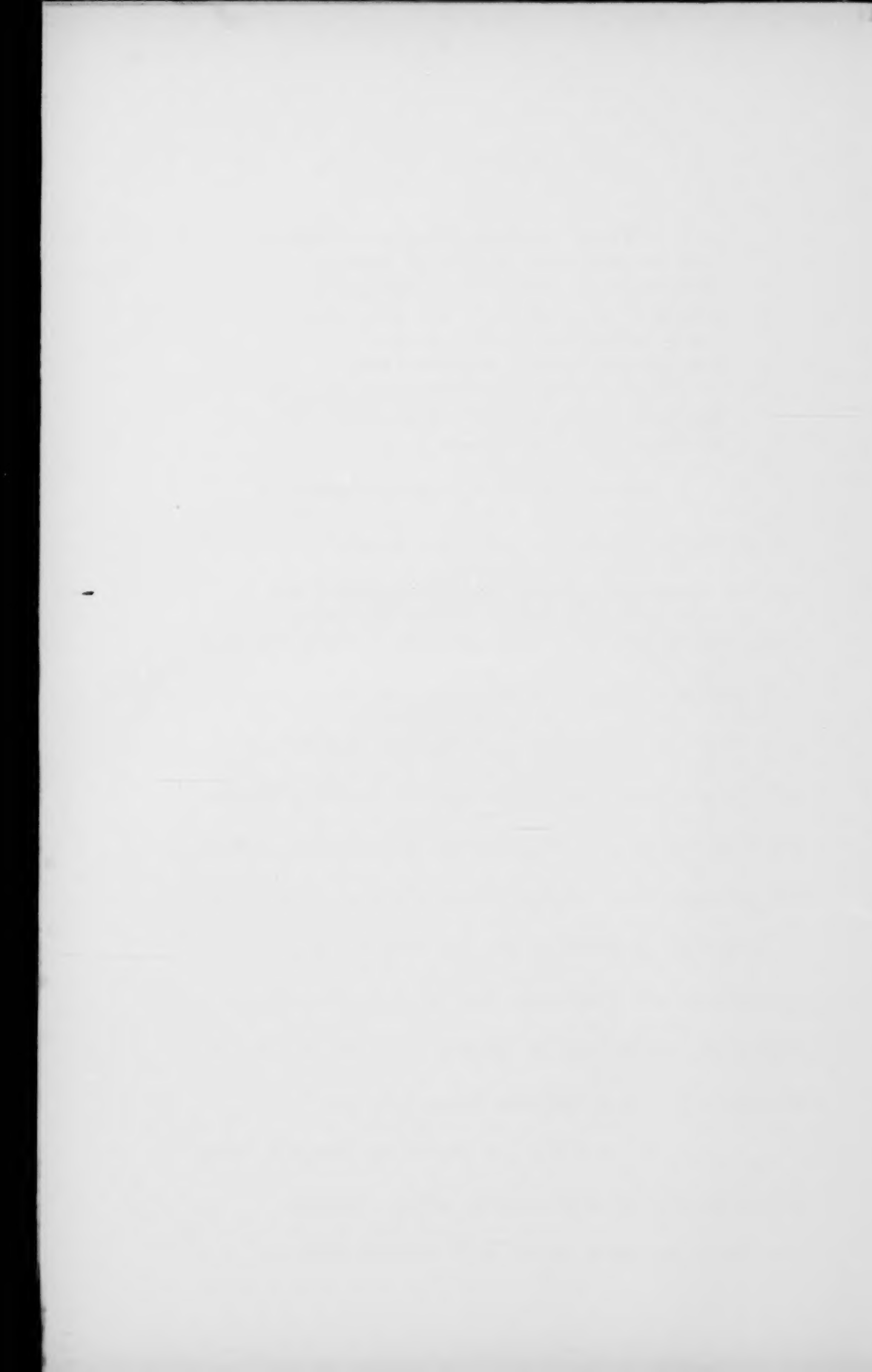




"This incomplete analogy was abandoned after a bench conference and this limited comment could not in any way have affected the verdict following this month-long trial." (Petr., App. A; In re Martin, supra, 150 Cal.App.3d at pp. 166-167.)

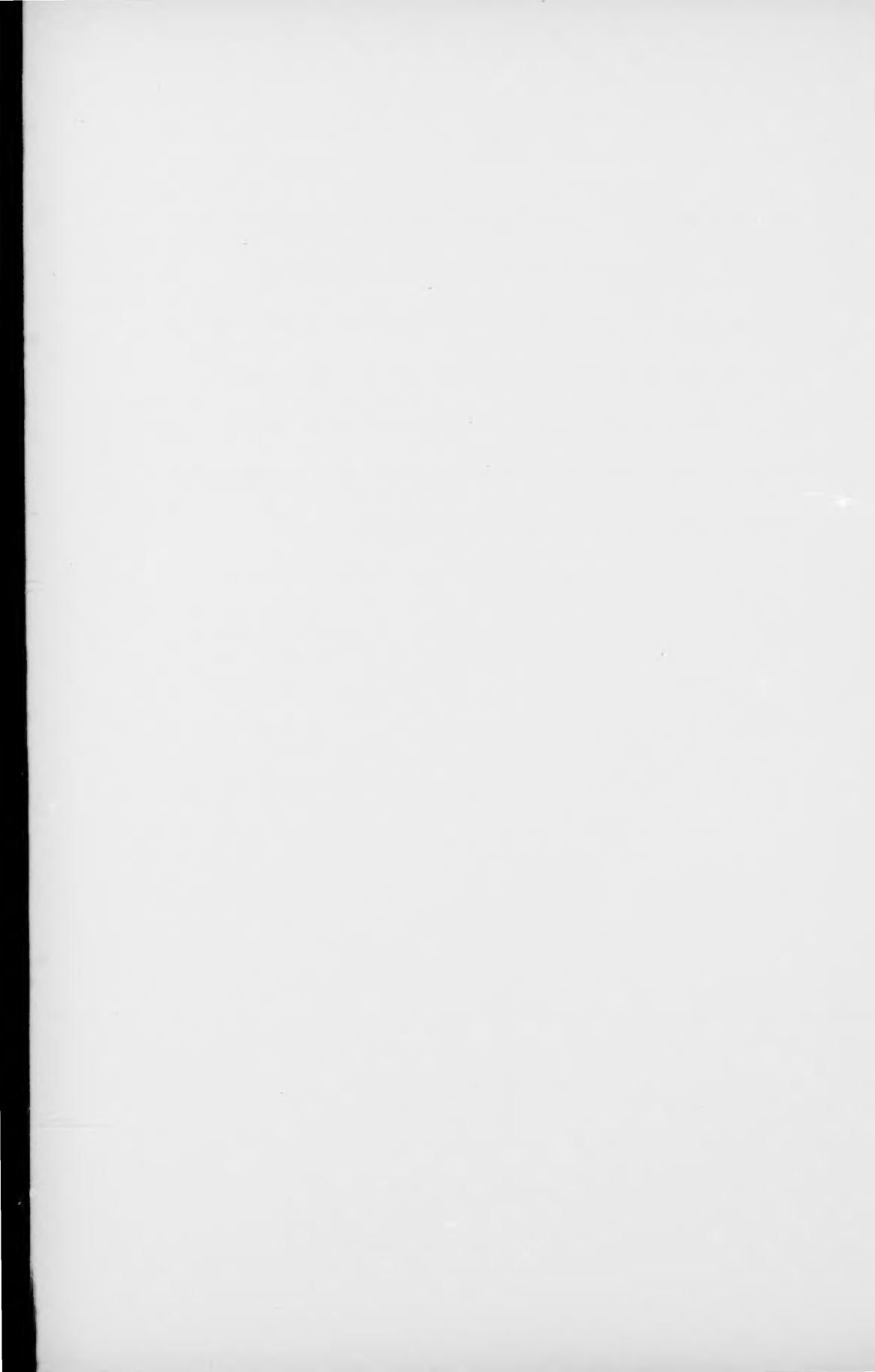
Thus, none of petitioner's complaints here is of the magnitude that would warrant granting of relief by a federal court. Furthermore, they do not fit within the guidelines of this Court for the grant of a review on guidelines of this Court for the grant of a review on certiorari. The factual allegations of prosecutor misconduct do not involve a federal question or an important question of federal law which require resolution by this Court. (See Rule 17, Rules of the Supreme Court.)

Finally, it must be noted that petitioner was charged with rather serious crimes here and there was



over-whelming evidence of his guilt, as noted earlier. Under these circumstances two or three inappropriate comments or questions could not have had any affect on the verdict of the jury. Thus, any conceivable error was harmless under any standard of prejudice.

\* \* \* \* \*



CONCLUSION

For the foregoing reasons,  
respondent respectfully requests the  
petition for writ of certiorari be  
denied.

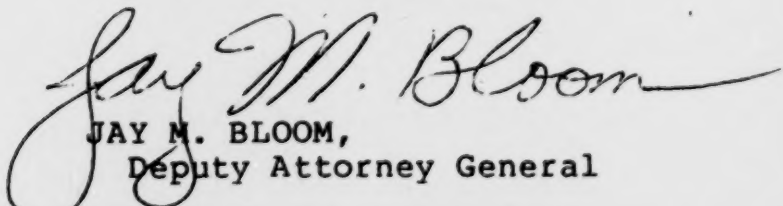
Respectfully submitted,

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## APPENDIX A

## APPENDIX A

### California Penal Code

"Sec 1324. Self-incrimination; order compelling testimony; exemption from prosecution; perjury, false swearing, contempt, etc.

"In any felony proceeding or in any investigation or proceeding before a grand jury for any felony offense if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the district attorney of the county in writing requests the superior court in and for that county to order that person to answer the question or produce the evidence, a judge of the superior court shall set a time for hearing and order the person to appear before the court and show cause, if any, why the question should not be answered or the evidence





produced, and the court shall order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction, and that person shall comply with the order.

"After complying, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order, he was required to answer or produce evidence. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in



answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order."

"Sec. 1324.1. Self-incrimination; misdemeanor; agreement; immunity from prosecution

"In any misdemeanor proceeding in any court, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, the person may agree in writing with the district attorney of the county, or the prosecuting attorney of a city, as the case may be to testify voluntarily pursuant to this section.

"Upon written request of such district attorney, or prosecuting attorney, the court having jurisdiction of the proceeding shall approve such written agreement, unless the court finds



that to do so would be clearly contrary to the public interest. If, after court approval of such agreement, and if, but for this section, the person would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with such agreement, he answered or produced evidence, but he may, nevertheless, be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering or in producing evidence in accordance with such agreement. If such person fails to give any answer or to produce any evidence in accordance with such agreement, that person shall be prosecuted or subjected to penalty or



forfeiture in the same manner and to the same extent as he would be prosecuted or subjected to penalty or forfeiture but for this section."

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

JOHN K. VAN DE KAMP  
Attorney General of  
the State of California  
JAY M. BLOOM  
Deputy Attorney General

No: 83-2062  
October Term, 1983

HERMAN G. MARTIN,  
Petitioner,  
v.

110 West A Street, Suite 700  
San Diego, California 92101

THE PEOPLE OF THE STATE  
OF CALIFORNIA

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF OF RESPONDENT IN OPPOSITION as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

Gerald B. Glazer  
Emry James Allen  
Attorneys at Law  
660 J Street, #380  
Sacramento, CA 95814

Keenan Casady  
Clerk, Court of Appeal  
Fourth Appellate District  
Division One  
1350 Front Street, Rm. 6010  
San Diego, CA 92101

Edwin L. Miller, Jr.,  
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P.O. Box X-1011  
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Robert D. Zumwalt  
County Clerk  
P.O. Box 128  
San Diego, CA 92101

Laurence P. Gill, Clerk  
California Supreme Court  
350 McAllister St, Rm. 4050  
San Francisco, CA 94102

For Delivery to Hon. Donald W. Smith

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 2 day of October, 1984.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, October 2, 1984.

Subscribed and sworn to before me  
this 2nd day of October, 1984.

Clifford E. Reed, Jr.  
CLIFFORD E. REED, JR.

Vida M. Allen  
NOTARY PUBLIC in and for said County and State



VIDA M. ALLEN

NOTARY PUBLIC—CALIFORNIA  
COUNTY OF SAN DIEGO

My commission expires Aug. 28, 1986